Supreme Court, U.S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLERK

80-456

IN THE

SUPREME COURT

OF THE

UNITED STATES

No.

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,

Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

SLADE GORTON
Attorney General
WALTER E. WHITE
Assistant Attorney General

Department of Social and Health Services
Mail Stop KA-11
Olympia, Washington 98504
(206) 753-7014

STATE PRINTING PLANT OLYMPIA, WASHINGTON

Questions Presented

1. Whether the State of Washington, Department of Social and Health Services is obligated under 45 C.F.R. § 232.12 to delete the needs of a caretaker relative receiving Aid to Families With Dependent Children and establishing protective payments for the children in those instances in which the caretaker relative who has assigned all support rights for the children under 45 C.F.R. § 232.11 then directly receives support money, fails to remit it to the state and expends the funds.

2. Does the failure to cooperate contemplated by 45 C.F.R. § 232.12(b) (4) mean the failure or refusal to pay over support money which is "presently" in the hands of the caretaker relative, or does it mean any failure to remit to the state agency even though the support money may have already been expended.

3. At what point can the sanction for failure to cooperate in turning over support money received by a caretaker relative be applied and what can cure the failure.

4. Are the State of Washington, Department of Social and Health Services regulations, WAC 388-14-200(2)(d) and WAC 388-14-200(3) and WAC 388-14-200(4) as interpreted by the state agency consistent with 42 U.S.C. § 602(a)(26) and 45 C.F.R. § 232.12.

IN THE

SUPREME COURT

OF THE

UNITED STATES

No.

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,

Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

SLADE GORTON
Attorney General
WALTER E. WHITE
Assistant Attorney General

Department of Social and Health Services
Mail Stop KA-11
Olympia, Washington 98504
(206) 753-7014

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
PARTIES	2
OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	8

Table of Authorities

Cases

American Federation of Musicians v. Whittstein, 379 U.S. 171, 175, 13 L. Ed. 2d 214, 85 S. Ct. 300 (1964) 8

King Manufacturing Company v. City Council of Augusta, 277 U.S. 100, 104, 105, 72 L. Ed. 801, 48 S. Ct. 489 (1927) ... 6

Sultan Railway and Timber Company v. Department of Labor and Industries of State of Washington, 277 U.S. 135, 72 L. Ed. 820, 48 S. Ct. 505 (1927) 6

Townsend v. Swank, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971) 6

Statutes and Regulations

28 U.S.C. § 1257(3) 3, 6

42 U.S.C. § 602(a)(26) 2, 3

45 C.F.R. § 232.11 ..... 2, 3

45 C.F.R. § 232.12 ..... 1, 2, 3

45 C.F.R. § 232.12(b)(4) 2

45 C.F.R. § 232.12(d) 7

Washington State Regulations

WAC 388-14-200 ..... 3, 5

WAC 388-14-200(1) 3

WAC 388-14-200(2)(d) 2, 5

WAC 388-14-200(3) 2, 5

WAC 388-14-200(4) 2, 5, 6

WAC 388-33-453 5

IN THE

SUPREME COURT

OF THE

UNITED STATES

No.

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,

Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

The Petitioners, Gerald J. Thompson and Robert Querry, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on January 10, 1980.

Questions Presented

1. Whether the State of Washington, Department of Social and Health Services is obligated under 45 C.F.R. § 232.12 to delete the needs of a caretaker relative receiving Aid to Families With Dependent Children and establishing

protective payments for the children in those instances in which the caretaker relative who has assigned all support rights for the children under 45 C.F.R. § 232.11 then directly receives support money, fails to remit it to the state and expends the funds.

2. Does the failure to cooperate contemplated by 45 C.F.R. § 232.12(b) (4) mean the failure or refusal to pay over support money which is "presently" in the hands of the caretaker relative, or does it mean any failure to remit to the state agency even though the support money may have already been expended.

3. At what point can the sanction for failure to cooperate in turning over support money received by a caretaker relative be applied and what can cure the failure.

4. Are the State of Washington, Department of Social and Health Services regulations, WAC 388-14-200(2)(d) and WAC 388-14-200(3) and WAC 388-14-200(4) as interpreted by the state agency consistent with 42 U.S.C. § 602(a)(26) and 45 C.F.R. § 232.12.

Parties

The parties are identified in the caption. The action was certified as a class action.

Opinion Below

The opinion of the Washington State Supreme Court is reported in 93 Wn.2d 17, 604 P.2d 1288, and appears in Appendix C hereto.

Jurisdiction

The judgment of the Supreme Court of Washington was entered on January 10, 1980. A timely petition for rehearing *en banc* was denied on May 14, 1980 and the decision became final by issuance of the Supreme Court of Washington Writ of Mandate to the King County Superior Court dated May 19, 1980. On August 4, 1980, the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States, granted an extension of time within which to file a Petition for Writ of Certiorari in the above-

entitled cause until and including September 11, 1980 (Appendix D), and this petition for certiorari will be filed by that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Statutory Provisions Involved

1. United States Provisions. 42 U.S.C.A. § 602(a)(26) (1977), 45 C.F.R. § 232.11 and 45 C.F.R. § 232.12 (1977), Appendix E.

2. State Provisions. Washington Administrative Code 388-14-200. The complete text of the regulation in effect in the time in question is attached as Appendix F.

Statement of the Case

The essential facts are as provided in the Findings of Fact set forth in the Findings of Fact and Conclusions of Law on Summary Judgment signed by the King County, Washington Superior Court on November 14, 1978 and filed on November 17, 1978 (with the exception of paragraphs 66 and 70), attached as Appendix A.

All of the respondent recipients of public assistance had assigned their child support rights to the Office of Support Enforcement of the Department of Social and Health Services pursuant to the requirements of 45 C.F.R. § 232.11 and Washington Administrative Code 388-14-200(1) (Finding No. 72, Appendix A), and all of them had agreed in writing to deliver to that state agency all support payments which might come into their possession during the time they were receiving public assistance.

All of the respondent recipients were determined to be members of a class of former, present and future AFDC recipients who have, are being, or may be taken off the AFDC grant, with the remaining portion of the family's grant being paid to a protective payee, including those recipients who have or may sign agreements with the Department's Office of Support Enforcement (OSE) promising to repay the amount of support monies not turned over, because of their

failure to turn over or have turned over support monies to OSE. (Finding No. 1, Appendix A).

As paragraph 59 of the Findings states on p. 8 (Appendix A):

> "If the caretaker relative fails to cooperate by not turning over support payments after the assignment of support rights has been made it is the policy of the petitioner state agency to determine that a condition of eligibility has not been satisfied and to delete the needs of the caretaker relative from the AFDC grant and pay the remaining portion of the grant to a protective payee."

As paragraph 62 states:

> "The needs of a caretaker relative could be restored to the AFDC grant if this person signed an agreement calling for monthly payments of at least ten percent of the amount of support payments not turned over, regardless of the recipient's financial ability to pay this monthly amount."

Paragraph 63 provides that, if the caretaker relative defaults on any of these monthly payments, that person's needs are again deleted from the grant and a protective payee is again set up until the recipient pays in one lump sum the entire amount of support payments not turned over regardless of the recipient's financial ability to pay the entire amount still owing. The amount by which the grant is reduced as a result of the recipient being taken off the grant is not credited toward reducing the amount of support not turned over to the state.

On November 28, 1977, the King County Superior Court entered a preliminary injunction which held in part:

> "1. Defendants, their successors, agents, and employees are hereby enjoined from taking AFDC recipients off the grant and setting up a protective payee to administer the remaining portion of the grant, because a recipient fails to turn over support payments to the Department's Office of Support Enforcement, pending final judgment in this action.

> 2. Defendants, their successors, agents, and employees are enjoined from taking AFDC recipients off the grant and setting up a protective payee to administer the remaining portion of the grant, because a recipient fails to comply with the repayment agreement calling for monthly payments of 10% or more of the amount of support payments not turned over, pending final judgment in this action."

By summary judgment signed November 14, 1978 and entered November 17, 1978, the King County, Washington Superior Court concluded that the policy of the petitioner and its regulations to the extent they authorized such policy (WAC 388-14-200 and WAC 388-33-453) violates the Social Security Act, federal regulations promulgated under the act and the equal protection and due process clauses of the United States and Washington State Constitutions (Appendix B). The petitioner was therein enjoined from deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient fails or has failed to turn over support payments to the Department's Office of Support Enforcement or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained.

The Washington Supreme Court affirmed the November 14, 1978 decision of the King County Superior Court (Appendix C). The court held that "WAC 388-14-200(4) is void because it conflicts with the Social Security Act and HEW regulations." The court did conclude that WAC 388-14-200(2)(d) and 388-14-200(3) were valid.

As described above, both the state trial court and the State Supreme Court addressed the federal issues. The King County, Washington Superior Court concluded that the policy of the petitioner and its regulations to the extent that it authorized such policy violated the Social Security Act, federal regulations promulgated under the Act and the equal protection and due process clauses of the United States and Washington State's Constitution (paragraphs 4 and 5,

page 3, of the summary judgment—Appendix B). The State Supreme Court affirmed the King County Superior Court decision without qualification and specifically held that WAC 388-14-200(4) was void because it conflicted with the Social Security Act and HEW regulations. (Appendix D).

Reasons for Granting the Writ

The primary question is whether state regulations duly promulgated by the Department of Social and Health Services of the State of Washington as applied by the Department are in violation of particular provisions of the Social Security Act and regulations of the Department of Health and Human Services.

A "statute" as contemplated by 28 U.S.C. § 1257(3) includes duly enacted state regulations having the force of law. It was held in *King Manufacturing Company v. City Council of Augusta*, 277 U.S. 100, 104, 105, 72 L. Ed. 801, 48 S. Ct. 489 (1927), that statutes included "every act legislative in character to which the state gives its sanction." Accord, *Sultan Railway and Timber Company v. Department of Labor and Industries of the State of Washington*, 277 U.S. 135, 72 L. Ed. 820, 48 S. Ct. 505 (1927). In any event, we submit that this case involves a claim by the respondents relating to entitlement to benefits under the Social Security Act which would be contemplated under that portion of subsection (3) which provides

> "* * * or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States."

In order for a state to qualify for federal matching funds under the program of Aid to Families With Dependent Children under the Social Security Act, it must satisfy certain requirements. *Townsend v. Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971). From the outset of the case at hand, the petitioners' sole objective has been to attempt to satisfy applicable federal requirements entitling the state to federal financial participation. On December 8,

1977, a letter was received from Louis B. Hays, Deputy Director, Office of Child Support Enforcement of the Department of Health, Education and Welfare, Washington, D.C., which stated generally that compliance with the preliminary injunction entered by the King County, Washington Superior Court could cause the loss of all federal matching funds to which the State of Washington might be entitled under the Aid to Families With Dependent Children Program established in IV-A of the United States Social Security Act (Appendix G). We have no record of this letter subsequently being withdrawn, rescinded or modified. However, subsequent to the decision of the Washington Supreme Court, on June 20, 1980, a letter was addressed to the petitioner from the Regional Commissioner of the Social Security Administration of the U.S. Department of Health and Human Services setting forth its position regarding its interpretation of § 402(26)(b) of the Social Security Act and 45 C.F.R. § 232.12(d). (Appendix H). These two letters from two different units within the Department of Health and Human Services leave the petitioners in doubt as to the position of that agency in this regard.

Thereafter, a letter dated August 8, 1980 was directed to the petitioner from the same Regional Commissioner of the Social Security Administration indicating that that agency was unable to approve the plan of the petitioner " * * * until court-ordered restraints arising out of the case of *Berry v. Burdman*, with respect to sanctions for recipient failure to cooperate, are resolved." The letter further states that it is anticipated that an "action transmittal" will be issued jointly by the Office of Family Assistance and the Office of Child Support Enforcement in the near future to further clarify federal requirements (Appendix I).

Until such time as a clear acceptable final binding statement is forthcoming from that federal agency, the State of Washington is in jeopardy of being unable to satisfy federal requirements necessary for federal financial participation as a result of the opinion of the Washington Supreme

Court. We submit that this presents a substantial federal question warranting the granting of this petition.

We further submit that this court should exercise its judicial discretion and grant this petition under the guideline provided in Rule 17(1)(c) for the reason that a state court has decided an important question of federal law which has not been, but should be, settled by this court. To our knowledge, an interpretation of this federal law has not been previously addressed by this court. It is an important issue which should be settled by this court. It could affect all states participating in the AFDC program. Consistent with Rule 17(1)(c), this court has granted certiorari when it has been determined that the question is an important one of first impression. *American Federation of Musicians v. Whittstein*, 379 U.S. 171, 175, 13 L. Ed. 2d 214, 85 S. Ct. 300 (1964).

Conclusion

For these reasons, a writ of certiorari should issue to review the opinion of the Washington Supreme Court.

Respectfully submitted,
SLADE GORTON,
Attorney General

WALTER E. WHITE,
Assistant Attorney General
Attorneys for Petitioners

SEP 10 1980

Dated .....

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 823412

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SUMMARY JUDGMENT

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated, *Plaintiffs,*

v.

MILTON BURDMAN, Acting Secretary of the Department of Social & Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement, *Defendants.*

Plaintiff's Motion for Summary Judgment was heard on May 10, 1977. Upon request of the court, the parties agreed to have the motion heard as a Motion for Summary Judgment, instead of as Motion for Preliminary Injunction as originally noted. Plaintiff's Motion for Retroactive Relief was heard on December 27, 1977, at which time the court granted plaintiffs' request in an oral decision.

Plaintiffs appeared by their attorneys Tony Lee, Patrick McIntyre and Linda Dawson; defendants by their attorney Walter White, Assistant Attorney General.

The court makes the following:

FINDINGS OF FACT

1. Named plaintiffs and class members are former, present, and future AFDC recipients who have been, are being, or may be taken off the AFDC grant, with the remaining portion of the family's grant being paid to a protective payee, including those recipients who have or may sign agreements with the Department's Office of Support Enforce-

ment (OSE) promising to repay the amount of support monies not turned over, because of their failure to turn over or have turned over support payments to OSE.

2. Plaintiff Gertrude Pierce and her four minor children started receiving public assistance benefits under the AFDC program in 1970.

3. Beginning in 1973, Ms. Pierce's former husband began paying $100 per month in child support payments to the County Clerk in California who in turn transferred the funds to the Snohomish County Clerk.

4. Because Ms. Pierce had assigned her child support rights to OSE, the Snohomish County Clerk sent the child support payments directly to OSE beginning in December of 1973.

5. During a brief period in October, 1975, Ms. Pierce was off of public assistance during which time OSE notified the Snohomish County Clerk that the child support payments were to be made directly to Ms. Pierce because Ms. Pierce was no longer on public assistance.

6. On November 7, 1975, Ms. Pierce got back on public assistance and informed OSE of that fact.

7. Not having been informed by OSE, the Snohomish County Clerk continued to send the child support payments directly to Ms. Pierce.

8. When she received the check in December of 1975, Ms. Pierce called the county clerk to inquire about the check.

9. Ms. Pierce was told that the money was for child support, but was not otherwise told what to do with it although she advised the clerk that she was back on public assistance.

10. Ms. Pierce retained the December, 1975 check and subsequent checks which continued to be sent to her through June, 1976.

11. OSE notified the Snohomish County Clerk that support payments for July and subsequent months were to be sent directly to OSE; such payments have been sent directly to OSE since the notification.

12. The local office sent a notice to Ms. Pierce stating that Ms. Pierce was not "cooperating" with the Department and her needs would be deleted from the grant with the remaining portion of the grant to be paid through a protective payee.

13. Ms. Pierce asked for an administrative hearing challenging the Department's actions and the hearing was held on September 1, 1976.

14. The defendant upheld the local office's action, even though the local office at the fair hearing, conceded that there was no fraud involved and that the payments received by Ms. Pierce were caused by Departmental error in failing to have the Snohomish County Clerk send the child support payments directly to OSE.

15. Ms. Pierce has petitioned for review of the Department's decision to the Superior Court.

16. In accordance with the Department's policy, Ms. Pierce's portion of the grant was not being credited to the debt she allegedly owed until, upon Ms. Pierce's Motion for Stay of Administrative Decision, the Superior Court ordered the defendant to credit Ms. Pierce's monthly portion of the grant to the debt she allegedly owes.

17. Plaintiff Genevieve Gallow, at all times relevant to this action, has been receiving financial disability benefits for herself under the SSI program, which is administered by the federal government.

18. Ms. Gallow received medical assistance for herself from the Department and was the payee of AFDC public assistance benefits for her three minor children.

19. On September 29, 1976, Ms. Gallow received a notice from the Department stating the November public assistance check would be redirected to the local office because she had allegedly not cooperated with OSE by failing to turn over child support payments.

20. On October 4, 1976, Ms. Gallow asked for an administrative hearing challenging the Department's proposed action; the hearing was held on November 1, 1976.

21. The Department's decision found that Ms. Gallow had not turned over child support payments for the period between September 15, 1976 and January 22, 1976 and, therefore, was not cooperating with OSE.

22. The decision further found that Ms. Gallow has cooperated in the transfer of all child support payments received since January, 1976.

23. In fact, the child support payments paid by Ms. Gallow's former husband have been going directly to OSE since January of 1976.

24. The Department, as a result of the fair hearing decision, set up a protective payee for public assistance benefits previously paid to her on behalf of her three minor children, until she agrees to pay the amount of $750 in monthly payments of $75.

25. By this lawsuit, Ms. Gallow appeals pursuant to RCW 34.04.130 and 74.08.080 from the fair hearing decision (Docket No. 1076 A-159).

26. Plaintiff Carol Poe and her two minor children have been receiving public assistance benefits under the AFDC program.

27. In May of 1976, the Department notified Ms. Poe that her grant would be reduced by deleting her needs from the grant and a protective payee set up, unless she agreed to pay 10% of the amount owing per month, which she subsequently agreed to do.

28. Pursuant to the agreement, Ms. Poe began to pay $105 a month and continued to do so until December of 1976, and contended that the amount owing was $900, not $1,050.

29. In December of 1976, Ms. Poe sent in $50 toward her remaining obligation.

30. The Department notified Ms. Poe that her grant was being reduced and that the remaining portion would be paid through a protective payee, until she paid the entire remaining obligation in one payment.

31. Ms. Poe has asked for an administrative hearing challenging the Department's proposed action.

32. Plaintiff Maggie Lee Ferrill and her one minor child have been receiving benefits under the AFDC program.

33. In May of 1976, the Department alleged that Ms. Ferrill had failed to turn over child support payments received between October 1, 1975 and the end of March, 1976, and notified her that her needs would be deleted from the grant and a protective payee status would be set up.

34. Ms. Ferrill agreed to pay the Department the amount of $45 per month.

35. In November of 1976, the Department informed Ms. Ferrill that she was not cooperating and informed her that her grant would be reduced by $86, and that the remaining portion would be paid through a protective payee, because of her failure to perform the terms of the repayment agreement.

36. Ms. Ferrill's former husband began to send the child support payments directly to OSE in April of 1976, and has continued to do so.

37. Plaintiff Mavis Berry and her two minor children have been receiving public assistance benefits under the AFDC program for several years.

38. In May 1976, the Department informed Ms. Berry that her needs were being deleted from the grant and that the remaining portion would be paid to a protective payee because of her alleged failure to turn over child support payments to OSE.

39. Ms. Berry asked for an administrative hearing challenging the Department's proposed action.

40. The hearing was scheduled for February 15, 1977.

41. Since the early part of 1976, the child support payments paid by Ms. Berry's ex-husband have been paid directly to OSE by the King County Clerk, until Ms. Berry went off of the AFDC program.

42. Ms. Berry and her children voluntarily terminated themselves from AFDC in September of 1976. She was

informed that the non-cooperation sanctions would be imposed against her if and when she got back on AFDC.

43. Plaintiff Bonnie Hadeen received AFDC public assistance benefits for herself and her minor child from April through September, 1976, when she requested that the grant be terminated.

44. Ms. Hadeen received child payments of $600 for the months of May, June, August, and September, 1976, and $50 for July of 1976.

45. Ms. Hadeen turned over all payments to OSE except for the September payment.

46. Ms. Hadeen obtained a job around the end of September, 1976 and withdrew from public assistance in October of 1976.

47. In November 1976, after losing her job, Ms. Hadeen reapplied for assistance.

48. Since November 1976, all support payments have been sent to OSE directly by the father.

49. In December of 1976, the Department informed Ms. Hadeen that she had failed to cooperate when she was previously on public assistance from April through September of 1976, and that her grant would be reduced by deleting her portion from the grant and that a protective payee would be set up.

50. The Department informed Ms. Hadeen that she owed $250 and would have to agree to repay that amount.

51. Ms. Hadeen conceded that she owed $100 and offered to make arrangements to pay it but insisted that she had not received anything more.

52. Ms. Hadeen's offer was initially refused, but an agreement was subsequently reached that Ms. Hadeen was to pay $100 in monthly payments of $10.

53. Ms. Hadeen has made a request for an administrative hearing and the hearing has been held.

54. By this lawsuit, Ms. Hadeen appeals from the administrative decision rendered against her (Docket No. 0177 A-238).

55. Class member Pat McCorkle filed a Notice of Intent to Proceed as a Class Action with the Department in October, 1976.

56. Defendant Robert Querry is the Chief of the Office of Support Enforcement.

57. Defendant Milton Burdman was the Acting Secretary of the Department of Social & Health Services at the time this action was filed; Gerald Thompson is the present Acting Secretary of the Department.

58. An order has been signed by Judge Soderland in this action certifying the class, defined as follows:

> All former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social & Health Services, including those recipients who have or may sign agreements promising to repay to the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

59. If the caretaker relative fails to cooperate by not turning over support payments after the assignment of support rights has been made, it is the defendants' policy to determine that a condition of eligibility has not been satisfied and to delete the needs of the caretaker relative from the AFDC grant and pay the remaining portion of the grant to a protective payee.

60. Under defendants' policy, it is irrelevant whether the recipients' failure to turn over the support payments is caused by fraudulent intent or not.

61. The amount by which the grant is reduced, as a result of the recipient being taken off the grant, is not credited toward reducing the amount of support not turned over to OSE.

62. The needs of a caretaker relative could be restored

to the AFDC grant if this person signed an agreement calling for monthly payments of at least 10% of the amount of support payments not turned over, regardless of the recipient's financial ability to pay this monthly amount.

63. If the caretaker relative defaults on any of these monthly payments, that person's needs are again deleted from the grant and a protective payee is again set up, until the recipient pays in one lump sum the entire amount of support payments not turned over, regardless of the recipient's financial ability to pay the entire amount still owing.

64. As a result of being taken off the AFDC grant, the recipient loses his/her cash benefits and may lose other benefits which an AFDC recipient is entitled, such as assistance food stamps, medical coupons, and child care, depending on individual factors of eligibility.

65. HEW has approved DSHS Transmittal 75-53 on State Plan under Title IV-D of the Social Security Act, on December 31, 1975.

66. Defendants' policies are harsh and are causing named plaintiffs and class members substantial and irreparable injury, as AFDC recipients are by definition persons requiring subsistence assistance.

67. The court has already entered a preliminary injunction against defendants in November of 1977.

68. The hearing on plaintiffs' request for retroactive relief on behalf of the class was heard on December 27, 1977.

69. The court finds that the exact number of class members is unknown, but according to defendants' estimate, it is about 2,000.

70. The court finds that it is appropriate to award retroactive relief on behalf of class members.

71. Plaintiffs' counsel have spent 175 hours on this action.

72. The named plaintiffs signed OSE Assignment of Support Rights Form DSHS 14-119 as follows: Bonnie Hadeen — April 12, 1976; Genevieve Gallow — August 19, 1975; Mavis Berry—May 29, 1974; Maggie Lee Ferrill—August 28, 1975; Gertrude Pierce—June 25, 1975 and No-

vember 3, 1975; and Carol Poe—September 1, 1975 and October 20, 1975. Paragraph No. 2 states:

> "I agree to send or deliver to an office of the Office of Support Enforcement designated by the Department of Social & Health Services all support payments from the above-named absent parent which may come into my possession during the time I receive public assistance to or for the benefit of my children."

From the above, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over this action pursuant to RCW 34.04.130 and 74.08.080.

2. There is no genuine issue as to any material fact, and named plaintiffs and class members are entitled to summary judgment as a matter of law.

3. The class is certified and is defined as follows:

> All former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social & Health Services, including those recipients who have or may sign agreements promising to repay to the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

4. Defendants' policy of deleting the needs of the caretaker relative from AFDC grant and paying the family's remaining portion to a protective payee because the recipient allegedly or actually fails or has failed to turn over support payments to the Department's Office of Support Enforcement after an assignment of support rights is made or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained, violates the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regu-

lations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

5. Defendants' regulations (WAC 388-14-200 and WAC 388-33-453) to the extent they authorize such policy, violate the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

6. Defendants, their successors, agents, and employees are permanently enjoined from deleting the needs of a caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient fails or has failed to turn over support payments to the Department's Office of Support Enforcement, or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained.

7. Defendants shall immediately reinstate named plaintiffs and class members back into the grant and shall remove the protective payee status.

8. Defendants, their successors, agents, and employees are permanently enjoined from enforcing any agreement promising to pay the Office of Support Enforcement the amount of support retained and such agreements are hereby voided.

9. The administrative decisions rendered against named plaintiffs Genevieve Gallow (Docket No. 1076 A-159), Gertrude Pierce (Docket No. 0776 A-428), and Bonnie Hadeen (Docket No. 0177 A-238), are hereby reversed.

10. State law permits the retroactive reinstatement of public assistance benefits which have been denied or reduced because of the application of invalid practices or regulations.

11. The extent of class relief to be granted is within the sound discretion of the trial court; the court finds that the financial burden to defendants is not sufficient to preclude

the award of retroactive relief. It is appropriate in this case to award relief to class members to January 25, 1977, which is the date this action was filed.

12. Class members are entitled to retroactive relief; they are to be paid the difference between the cash benefits they received on or after January 25, 1977 and the cash benefits they would have received if they had not been taken off the grant pursuant to defendants' challenged policy.

13. Class members are also to be paid the value of food stamps, child care expense, and medical expenses they would have been entitled to on or after January 25, 1977, had they not been taken off the grant pursuant to defendants' challenged policy, less any of such benefits which were actually paid by defendants.

14. Named plaintiffs are to be paid cash benefits, value of food stamps, child care expenses, and medical expenses they would have been entitled to without the limitation of January 25, 1977.

15. Named plaintiffs and class members are to be paid the amount paid by them on or after January 25, 1977 under the monthly repayment agreements signed by them.

16. Defendants shall mail notices to class members who can be identified without making a search through individual local office (ESSO) files and OSE files.

17. As for those class members who cannot be so identified, the defendants shall provide constitutionally adequate notice concerning the availability of relief under this court's order. In the present case, constitutionally adequate notice includes insertion of a notice with all AFDC checks for one month, newspaper publication and posting of notices in all local welfare offices of DSHS as set forth more fully in the attached Order Administering Class Relief, which is hereby incorporated.

18. Class relief shall be administered under a claims system through which class members are to file claims for retroactive relief with their local offices of DSHS in order

to be entitled to relief. The Department shall be required to act on all claims with a reasonable period of time.

19. Persons whose claims for retroactive relief under this court's order are denied, shall be entitled to appeal the denial by means of administrative hearing and judicial review pursuant to RCW 74.08.080 and RCW 34.04.150.

20. Named plaintiffs are to be paid such benefits directly.

21. Any benefits awarded under this order shall not be counted as income or resources in any public assistance, food stamp, or medical assistance program administered by defendants.

22. The relief awarding back benefits shall be stayed pending decision on appeal; injunctive and declaratory relief shall not be stayed and shall remain in effect.

23. Plaintiffs are entitled to $6,500 in reasonable attorneys' fees, pursuant to RCW 74.08.080, as set forth more fully in the attached Order Awarding Attorneys' Fees, which is hereby incorporated.

DONE IN OPEN COURT this 14 day of November, 1978.

/s/ JUDGE NANCY HOLMAN

Presented by:

TONY LEE
Attorney for Plaintiffs

Approved for entry, notice
of presentation waived:

WALTER E. WHITE
Attorney for Defendants

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 823412

SUMMARY JUDGMENT

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated, *Plaintiffs,*

v.

MILTON BURDMAN, Acting Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement, *Defendants.*

Plaintiffs' Motion for Summary Judgment was heard on May 10, 1977. Upon request of the court, the parties agreed to have the Motion heard as a Motion for Summary Judgment, instead of as Motion for Prelimiary Injunction as originally noted. Plaintiffs' Motion for Retroactive Relief was heard on December 27, 1977, at which time the court granted plaintiffs' request on an oral decision.

Plaintiffs appeared by their attorneys Tony Lee, Patrick McIntyre, and Linda Dawson; defendants by their attorney Walter White, Assistant Attorney General.

The court considered the following documents (parenthetical references are to the clerk subfile document numbers): Petition for Review and Complaint for Declaratory and Injunctive Relief and Damages (1); Stipulation of Parties (8); Order Certifying Class (9); Affidavit of Carol Poe (10); Affidavit of Patrick McIntyre (11); Affidavit of Maggie Lee Ferrill (12); Affidavit of Wardell Alexander (13); Plaintiffs' Brief in Support of Summary Judgment (17); Affidavit of Carole Greene (19); Defendants' Answer (2); Defendants' Affidavits and Briefs in Opposition to

Motion for Summary Judgment (24); Plaintiffs' Brief in Support of Motion for Preliminary Injunction (25); Administrative Decision, In re: Gertrude Y. Pierce, Docket No. 0776 A-428 (25); letter of Departmental representative Chris Currie (25); portion of Administrative Decision, In re: Pat McCorkle, Docket No. 1076 A-109 (25); Administrative Decision, In re: Deborah Kay Moran, Docket No. 1076 A-133 (25); Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction (29); Memorandum Opinion (33); Affidavit of Tony Lee on Attorneys' Fees (37); Preliminary Injunction (39); Findings of Fact and Conclusions of Law (40); Plaintiffs' Brief in Support of Proposed Summary Judgment Order (42); Defendants' Memorandum in Opposition to Proposed Summary Judgment Order (44); Plaintiffs' Reply Brief on Back Benefits (47); and Plaintiffs' Interrogatories to Defendants (53); Plaintiffs' Brief in Support of Award of Attorneys' Fees ( ); Plaintiffs' Supplementary Brief in Support of Award of Attorneys' Fees ( ); Supplementary Affidavit of Tony Lee on Attorneys' Fees (with attached article) ( ); Affidavit of Pat McIntyre in Support of Attorneys' Fees Award ( ); Affidavit of Robert Jaffe on Attorneys' Fees ( ); Affidavit of Ron Mamiya ( ); Affidavit of Sally Pasette on Attorneys' Fees; Defendants' Memorandum in Opposition to Plaintiffs Claim for Attorneys' Fees ( ).

The court having already entered the Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. The class is certified and is defined as follows:

All former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social & Health Services, including those recipients who have or may sign agreements promising to repay to

the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

2. The court has jurisdiction over this action pursuant to RCW 34.04.130 and 74.08.080.

3. There is no genuine issue as to any material fact and named plaintiffs and class members are entitled to Summary Judgment as a matter of law.

4. The court has entered a Preliminary Injunction in this action.

Defendants' policy of deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient allegedly or actually fails or has failed to turn over support payments to the Department's Office of Support Enforcement after an assignment of support rights has been made, or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained violates the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

5. Defendants' regulations (WAC 388-14-200 and WAC 388-33-453) to the extent they authorize such policy, violate the Social Security Act (42 U.S.C. § 601 *et seq.*), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

6. Defendants, their successors, agents, and employees are permanently enjoined from deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient fails or has failed to turn over support payments to the Department's Office of Support Enforcement or because the recipient fails or has failed to comply with

an agreement promising to pay the Office of Support Enforcement the amount of support retained.

7. Defendants shall immediately reinstate named plaintiffs and class members back into the grant and shall remove the protective payee status.

8. Defendants, their sucessors, agents and employees are permanently enjoined from enforcing any agreement promising to pay the Office of Support Enforcement the amount of support retained and such agreements are hereby void.

9. The Administrative Decisions rendered against named Plaintiffs Genevieve Gallow (Docket No. 1076 A-159), Gertrude Pierce (Docket No. 0776 A-428), and Bonnie Hadeen (Docket No. 0177 A-238), are hereby reversed.

10. State law permits the retroactive reinstatement of public assistance benefits which have been denied or reduced because of the application of invalid practices or regulations.

11. The extent of class relief to be granted is within the sound discretion of the trial court; the court finds that the financial burden to defendants is not sufficient to preclude the award of retroactive relief. It is appropriate in this case to award relief to class members to January 25, 1977, which is the date this action was filed.

12. Class members are entitled to retroactive relief; they are to be paid the difference between the cash benefits they received on or after January 25, 1977, and the cash benefits they would have received if they had not been taken off the grant pursuant to defendants' challenged policy.

13. Class members are also to be paid the value of food stamps, child care expenses, and medical expenses they would have been entitled to on or after January 25, 1977, had they not been taken off the grant pursuant to defendants' challenged policy, less any of such benefits which were actually paid by defendants.

14. Named plaintiffs are to be paid the cash benefits, value of food stamps, child care expenses, and medical expenses

they would have been entitled to without the limitation of January 25, 1977.

15. Named plaintiffs and class members are to be paid the amount paid by them on or after January 25, 1977 under the monthly repayment agreements signed by them.

16. Defendants shall mail notices to class members who can be identified without making a search through individual local office (ESSO) files and Office of Support Enforcement (OSE) files.

17. As for those class members who cannot be so identified, the defendants shall provide constitutionally adequate notice concerning the availability of relief under this court's Order. In the present case, constitutionally adequate notice includes insertion of a notice with all AFDC checks for one month, newspaper publication and posting of notices in all local welfare offices of DSHS as set forth more fully in the attached Order Administering Class Relief, which is hereby incorporated.

18. Class relief shall be administered under a claims system through which class members are to file claims for retroactive relief with their local offices of DSHS in order to be entitled to relief. The Department shall be required to act on all claims within a reasonable period of time.

19. Persons whose claims for retroactive relief under this court's Order are denied, shall be entitled to appeal the denial by means of administrative hearing and judicial review pursuant to RCW 74.08.080 and RCW 34.04.130.

20. Named plaintiffs are to be paid such benefits directly.

21. Any benefits awarded under this Order shall not be counted as income or resources in any public assistance, food stamp, or medical assistance program administered by defendants.

22. The relief awarding back benefits shall be stayed pending decision on appeal; injunctive and declaratory relief shall not be stayed and shall remain in effect.

23. Plaintiffs are entitled to $6,500 in reasonable attorneys' fees pursuant to RCW 74.08.080, as set forth more

fully in the attached Order Awarding Attorneys' Fees, which is hereby incorporated.

DONE IN OPEN COURT this 14 day of November, 1978.

/s/ JUDGE NANCY HOLMAN

Presented by:
TONY LEE, *Attorney for Plaintiffs*
Approved for entry, notice
of presentation waived:
WALTER E. WHITE, *Attorney for Defendants*

APPENDIX C

[No. 45275. En Banc. January 10, 1980.]

MAVIS BERRY, ET AL, *Respondents*, v. MILTON BURDMAN, ET AL, *Appellants*.

[1] Public Assistance—AFDC—Eligibility—State Requirements—Validity. In the absence of clear congressional authorization, a state may not impose conditions of eligibility upon recipients of AFDC which are more restrictive than the eligibility standards set forth in federal law.

[2] Public Assistance—AFDC—Eligibility—State Recovery of Support Payments—Validity. WAC 388-14-200(4), which requires a recipient of AFDC under certain circumstances to remit to the State the full amount of support payments received from an absent parent in order to remain eligible for further aid, conflicts with the Social Security Act and with regulations of the Department of Health, Education, and Welfare and is void.

Nature of Action: Recipients of AFDC brought a class action seeking to overturn certain rules of the Department of Social and Health Services involving payment to the State of support money received from an absent parent.

Superior Court: The Superior Court for King County, No. 823412, Nancy A. Holman, J., on November 17, 1978, granted summary judgment in favor of the plaintiffs and awarded them attorney fees.

Supreme Court: Holding that WAC 388-14-200(4) imposed conditions of eligibility for AFDC which were not authorized by federal statutes or regulations, the court *affirms* the summary judgment and *remands* the case for a determination of attorney fees on appeal.

Slade Gorton, Attorney General, and *Walter E. White, Assistant,* for appellants.

Tony Lee of *Evergreen Legal Services,* for respondents.

WRIGHT, J. — This is a class action, the certified class being:

> [a]ll former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social and Health Services, including those recipients who have or may sign agreements promising to repay to the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

Summary judgment was granted to plaintiff class against the Department of Social and Health Services (DSHS) and the Office of Support Enforcement (OSE). The matter came directly to this court.

Plaintiffs-respondents contend on behalf of the class that certain DSHS rules violate the Aid for Families with Dependent Children (AFDC) provisions of the Social Security Act (42 U.S.C.A. § 601 *et seq.* (1977)) and rules of the Department of Health, Education and Welfare (HEW) included in 45 C.F.R. § 232.12 (1977).

The relevant part of the Social Security Act is 42 U.S.C.A. § 602(a) (1977), which reads in part:

> (a) A State plan for aid and services to needy families with children must * * * (26) provide that, *as a condition of eligibility* for aid, *each applicant or recipient will be required*—
>
> (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,
>
> (B) *to cooperate with the State* (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) *in obtaining support payments for such applicant* and for a child with respect to whom such aid is claimed * * * and

that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) * * *

(Italics ours.)

Implementing this statute, the HEW secretary promulgated 45 C.F.R. § 232.12 (1977) which read in part:

The State plan must provide that:

(a) *As a condition of eligibility* for assistance, *each* applicant for or *recipient* of AFDC *will be required to cooperate* with the State *in*:

(1) Identifying and locating the parent of a child with respect to whom aid is claimed;

(2) Establishing the paternity of a child born out of wedlock with respect to whom aid is claimed;

(3) *Obtaining support payments* for such applicant or recipient and for a child with respect to whom aid is claimed; and

(4) Obtaining any other payments or property due such applicant or recipient of such child.

(b) *"Cooperate" includes* the following:

* * *

(4) After an assignment under § 232.11 has been made, *paying to the child support agency any child support payments received from the absent parent* which are covered by such assignment.

(c) If the child support agency notifies the State or local agency of evidence of failure to cooperate, the State or local agency shall act upon such information in order to enforce the eligibility requirements of this section.

(d) If the relative with whom a child is living fails to comply with the requirements of paragraph (a) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(e) If the relative with whom a child is living is found to be ineligibile for assistance because of failure to comply with the requirements of paragraph (a) of this section, any aid for which such child is eligible (determined without regard to the needs of the caretaker relative) will be provided in the form of protective payments as described

in § 234.60 of this chapter.
(Italics ours.)

Pursuant to these federal provisions, DSHS also promulgated rules. The provisions involved here are contained in WAC 388-14-200, which reads in part:

> This section establishes the initial and continuing requirements which affect eligibility for aid to families with dependent children.
>
> (1) Beginning August 1, 1975, as a condition of eligibility for assistance, each applicant/recipient shall make assignment to the office of support enforcement of any and all right, title, and interest in any support obligation the applicant/recipient may have in his or her own behalf or in behalf of any other family member for whom the applicant/recipient is applying for or receiving financial assistance including rights to support which have accrued at the time such assignment is executed.
>
> * * *
>
> (2) When (1), above is satisfied, *cooperation is further required as a continuing condition of eligibility* for assistance. *Cooperation includes* identifying and locating absent parents including possible putative fathers, and in establishing paternity of a child or children, and/or in *obtaining support payments* or any other payments or property due the applicant/recipient or child(ren) as further provided below:
>
> * * *
>
> (d) *Cooperation in the obtaining of support payments further includes but is not limited to:*
>
> (i) Providing of specific information at the time of application to establish the amount of the support debt accrued to the applicant/recipient prior to application for assistance.
>
> (ii) *Immediate remittance of all support payments received by the applicant/recipient from any person or agency to the office of support enforcement.*
>
> (3) If the applicant/recipient fails to cooperate as defined above the caretaker/relative shall be ineligible to receive assistance and any assistance for which the children may be eligible shall be provided by protective payment as specified in WAC 388-33-453; the determination of requirements for the child(ren) shall be computed

without regard to the requirements of the caretaker/relative.

(4) *If support monies are not promptly remitted and protective payments have been established* without regard to the requirements of the caretaker/relative pursuant to WAC 388-33-453, *the office of support enforcement may enter into a written agreement with the caretaker/relative for satisfaction of the obligation of remittance of support payments by monthly installment payments to the office of support enforcement in amounts not less than ten percent of the original amount not remitted. If a caretaker/relative makes such an agreement for satisfaction and is restored to grant status and fails to make the required monthly payments or again fails to promptly remit support monies received direct, said recipient is subject to WAC 388-33-453 and thereafter may establish cooperation under this subsection only by remittance to the office of support enforcement of the full amount of support monies received.*

(Italics ours.)

In question are WAC 388-14-200(2)(d) and 388-14-200 (3), which we hold to be valid, and WAC 388-14-200(4), which we hold to be invalid.

The Social Security Act makes cooperation a condition of AFDC eligibility. The act requires assignment of support money received from an absent parent and the HEW regulations extend this requirement to include paying that support money to the proper state agency—in this state, OSE. WAC 388-14-200(2)(d) and (3) are consistent with these requirements. It should be noted the present DSHS regulations as amended require remittance of support payments to OSE within 8 days rather than immediately.

[1, 2] WAC 388-14-200(4), however, presents a problem because it establishes new requirements for eligibility. The new requirements include entering into a written agreement to provide *inter alia* for repayment in monthly installment payments of not less than 10 percent of the original amount not remitted. In case of any default in the making of these payments or in remitting support money

thereafter, the whole amount must be paid in full. Such requirements are not imposed or authorized in either the Social Security Act or the HEW regulations.

In *Burns v. Department of Social & Health Servs.*, 20 Wn. App. 585, 581 P.2d 1069 (1978) the Court of Appeals said:

> The Social Security Act provides that "aid to families with dependent children shall be furnished with reasonable promptness to all *eligible individuals* * * * " (Italics ours.) 42 U.S.C. § 602(a)(10). The principle has been established that the states cannot exclude otherwise eligible individuals or families by imposing additional conditions of eligibility not contained in the Social Security Act. *Carleson v. Remillard*, 406 U.S. 598, 32 L. Ed. 2d 352, 92 S. Ct. 1932 (1972); *Townsend v. Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971); *King v. Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968). In *Townsend* the court stated the principle as follows:
>
> > [A]t least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.
>
> *Townsend v. Swank, supra* at 296.

(Footnote omitted.) *Burns*, at 588. In *Burns v. Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469, 95 S. Ct. 1180 (1975), the United States Supreme Court stated: "*King, Townsend* and *Carleson* establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns v. Alcala, supra* at 580.

Here the clear indication is to the contrary. Congress has stated in the Social Security Act the AFDC program objectives:

> [f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives

> by enabling each State to furnish financial assistance and rehabilitation and other services * * * to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection * * *

42 U.S.C.A. § 601 (1977).

It is apparent that the harsh provision of the DSHS rules requiring immediate repayment of the full amount in certain instances most often makes it impossible for the recipient to regain eligibility. It is hard to understand how a department charged with service to people could promulgate such a cruel regulation. The rule is tantamount to an adhesion contract in its most oppressive form.

True, any provision for recovery of sums from public assistance recipients presents difficulties. These human beings generally receive only the bare minimum necessary for a reasonable existence. To take any part of that minimum away for repayment of any amount due the state results in hardship. This provision for repayment in full, however, exceeds the hardship of other repayment schemes and surpasses all bounds of reason.

We hold that WAC 388-14-200(4) is void because it conflicts with the Social Security Act and the HEW regulations. Having reached this conclusion we do not need to discuss plaintiffs' other contentions and affirm the trial court.

We also affirm the trial court's decision to allow attorneys' fees to respondents in the sum of $6,500. These are called for under RCW 74.08.080 and several cases decided by this court, including *Tofte v. Department of Social & Health Servs.*, 85 Wn.2d 161, 531 P.2d 808 (1975). In that case we said:

> We conclude that the fundamental underpinning of the fee award provision is a policy at once punitive and deterrent — a corrective policy which would discipline

> respondent for violations of Title 74 RCW or of its own regulations, by shifting to the respondent the costs of righting its mistakes. Appellant cites 14 cases brought by SCLS in superior courts in 1974, all appeals of respondent's welfare decisions. In all but one, SCLS was successful in obtaining a court reversal of the decision of respondent, but seldom, it seems, was awarded the statutory attorney fees. At present, it is contended, the private bar shuns welfare cases, leaving them to SCLS; the respondent thus has rarely been assessed fees where incautious, careless, or wrongful actions by its employees have improperly denied benefits and required correction by an appellate court. Clearly an incentive to more careful scrutiny is not out of place. Respondent admits that "a decision for the appellant would give the Department added cause to evaluate each case with more scrutiny."

Tofte, at 165. *See also Whitehead v. Department of Social & Health Servs.,* 92 Wn.2d 265, 595 P.2d 926 (1979).

We affirm the trial court and remand only for the purpose of fixing fees for respondents' counsel on this appeal.

UTTER, C.J., and ROSELLINI, STAFFORD, BRACHTENBACH, HOROWITZ, DOLLIVER, HICKS, and WILLIAMS, JJ., concur.

THE SUPREME COURT OF WASHINGTON

No. 45275

MAVIS BERRY, *et al,* *Respondents,*

v.

MILTON BURDMAN, *et al,* *Appellants.*

ORDER
DENYING MOTION FOR RECONSIDERATION

The Court having unanimously decided that the appellants' motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 14th day of May, 1980.

/s/ ROBERT F. UTTER
Chief Justice

93 Wn.2d 17

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 45275

King County No. 823412

MANDATE

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, *Respondents*

v.

MILTON BURDMAN, Acting Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of Office of Support Enforcements, *Appellants.*

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 10, 1980, became the decision terminating review of this court in the above entitled case on May 14, 1980. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:

No cost bill having been filed, costs are deemed waived.

An order Denying Motion for Reconsideration was entered in this case on May 14, 1980; copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 19th day of May, A.D. 1980.

/s/ JOHN J. CHAMPAGNE
Clerk of the Supreme Court,
State of Washington

cc:
Hon. Slade Gorton
Attorney General
Mr. Walter E. White, *Asst.*
Evergreen Legal Services
Ms. Deborah Maranville
Reporter of Decisions

APPENDIX D

SUPREME COURT OF THE UNITED STATES
No. A-121

GERALD THOMPSON, Secretary, Department of Social & Health Services, *et al.*, *Petitioners,*

v.

MAVIS BERRY, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 11, 1980.

/s/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme Court of the United States

Dated this 4 day of August, 1980.

APPENDIX E

42 § 602 PUBLIC HEALTH AND WELFARE

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section);

§ 232.11 Assignment of rights to support.

(a) The State plan must provide that:

(1) As a condition of eligibility for assistance, each applicant for or recipient of AFDC shall assign to the State any rights to support from any other person as such applicant or recipient may have:

(i) In his own behalf or in behalf of any other family member for whom the applicant or recipient is applying for or receiving assistance; and

(ii) Which have accrued at the time such assignment is executed.

(2) If the relative with whom a child is living fails to comply with the requirements of paragraph (a)(1), (2), or (3) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(3) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a)(1), (2), or (3) of this section, any aid for which such child is eligible (determined without regard to the needs of the ineligible relative) will be provided in the form of protective payments as described in § 234.60 of this chapter.

(4) For new applicants, the requirements of paragraph (a) of this section shall be effective August 1, 1975; and for current recipients, it shall be effective as determined by the State agency but not later than the time of the next redetermination of eligibility required by § 206.10(a)(9) of this chapter and in any event not later than February 1, 1976.

(b) An assignment by operation of state law which is substantially identical to the requirements of paragraph (a)(1) may be utilized in lieu of the assignment described in that paragraph.

(c) If there is a failure to execute an assignment pursuant to this section, the State may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations.

[40 FR 27154, June 26, 1975, as amended at 40 FR 52376, Nov. 10, 1975]

§ 232.12 Cooperation in obtaining support.

The State plan must provide that:

(a) As a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate with the State in:

(1) Identifying and locating the parent of a child with respect to whom aid is claimed;

(2) Establishing the paternity of a child born out of wedlock with respect to whom aid is claimed;

(3) Obtaining support payments for such applicant or

recipient and for a child with respect to whom aid is claimed; and

(4) Obtaining any other payments or property due such applicant or recipient of such child.

(b) "Cooperate" includes the following:

(1) Appearing at the offices of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by him, that is relevant to achieving the objectives of paragraph (a) of this section;

(2) Appearing as a witness at court or other hearings or proceedings necessary to achieving the objectives of paragraph (a) of this section;

(3) Providing information, or attesting to the lack of information, under penalty of perjury; and

(4) After an assignment under § 232.11 has been made, paying to the child support agency any child support payments received from the absent parent which are covered by such assignment.

(c) If the child support agency notifies the State or local agency of evidence of failure to cooperate, the State or local agency shall act upon such information in order to enforce the eligibility requirements of this section.

(d) If the relative with whom a child is living fails to comply with the requirements of paragraph (a) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(e) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a) of this section, any aid for which such child is eligible (determined without regard to the needs of the caretaker relative) will be provided in the form of protective payments as described in § 234.60 of this chapter.

APPENDIX F

WAC 388-14-200 ELIGIBILITY—ASSIGNMENT OF SUPPORT RIGHTS—COOPERATION WITH OFFICE OF SUPPORT ENFORCEMENT —EFFECT OF NONCOOPERATION (AMD 6-26-78)

This section establishes the initial and continuing requirements which affect eligibility for aid to families with dependent children.

(1) Beginning August 1, 1975, as a condition of eligibility for assistance, each applicant/recipient shall make assignment to the office of support enforcement of any and all right, title, and interest in any support obligation the applicant/recipient may have in his or her own behalf or in behalf of any other family member for whom the applicant/recipient is applying for or receiving financial assistance including rights to support which have accrued at the time such assignment is executed.

(a) Each ongoing applicant/recipient after August 1, 1975 must make this new assignment. Assignments will be necessary as a condition of continued aid due no later than the date of the next eligibility review. See WAC 388-24-108.

(b) The new assignment must be made before the applicant/recipient is eligible to receive bonus payments.

(2) When (1), above is satisfied, cooperation is further required as a continuing condition of eligibility for assistance unless the ESSO determines that the applicant/recipient has good cause not to cooperate under WAC 388-24-111. Cooperation includes identifying and locating absent parents including possible putative fathers, and in establishing paternity of a child or children, and/or in obtaining support payments or any other payments or property due the applicant/recipient or child(ren) as further provided below:

(a) Cooperation in identifying and locating absent parents including putative fathers includes, but is not limited to:

(i) Providing all known relevant information such as the absent parent's name including known aliases, address, telephone or message number; social security number, employment history, physical description, and data regarding the date and place of marriage, separation, divorce, and dissolution including copies of documents and court orders establishing paternity and/or support obligations, if any. Information must be given at the time of application or at a later time if requested by the office of support enforcement to supplement existing information;

(ii) Providing notice to the office of support enforcement of any and all necessary information concerning the absent parent(s), including all men who could possibly be the putative father of a child on whose behalf the recipient applied for or receives public assistance, and also providing notice of changes in the information and/or notice of new information as available.

(b) Cooperation in establishing the paternity of a child or children including, but not limited to: taking all reasonable action in cooperation with the office of Support enforcement, the prosecuting attorneys, the attorney general, courts or other agencies, in administrative hearings, or in actions to prosecute or maintain any legal action or remedy for the establishment of paternity or in investigation preparatory to or supplementary to such hearings or actions, and to develop medical and anthropological evidence relating to the alleged father's paternity based upon tests performed by experts on the mother and the child.

(c) Cooperation in establishing and collecting support and/or in obtaining support payments or any other payments or property due the applicant/recipient or child(ren) includes taking all reasonable action in cooperation with the office of support enforcement, the prosecuting attorneys, the attorney general, courts or other agencies in administrative hearings or in actions to prosecute or maintain any legal action or remedy for the establishment or collection of support obligations or in investigations

preparatory to or supplementary to such hearings or actions.

(d) Cooperation in the obtaining of support payments further includes but is not limited to:

(i) Providing of specific information at the time of application to establish the amount of the debt accrued to the applicant/recipient prior to application for assistance.

(ii) Immediate remittance of all support payments received by the applicant/recipient from any person or agency to the office of support enforcement.

(3) If the applicant/recipient fails to cooperate as defined above the caretaker/relative shall be ineligible to receive assistance and any assistance for which the children may be eligible shall be provided by protective payment as specified in WAC 388-33-453; the determination of requirements for the child(ren) shall be computed without regard to the requirements of the caretaker/relative.

(4) If support monies are not promptly remitted and protective payments have been established without regard to the requirements of the caretaker/relative pursuant to WAC 388-33-453, the office of support enforcement may enter into a written agreement with the caretaker/relative for satisfaction of the obligation of remittance of support payments by monthly installment payments to the office of support enforcement in amounts not less than ten percent of the original amount not remitted. If a caretaker/relative makes such an agreement for satisfaction and is restored to grant status and fails to make the required monthly payments or again fails to promptly remit support monies received direct, said recipient is subject to WAC 388-33-453 and thereafter may establish cooperation under this subsection only by remittance to the office of support enforcement of the full amount of support monies received.

(5) In the event of failure to cooperate under the requirements of this section and/or WAC 388-24-108 and/or 109, "aid to families with dependent children" does not mean payments with respect to a parent (or other individual whose needs should be considered in determining the need of the child(ren) or relative claiming

aid) of a child or children. Nothing in these rules shall be construed to make an otherwise eligible child ineligible for protective payments because of the failure of such parent (or such other individual) to cooperate or make assignment.

APPENDIX G

Mr. Robert E. Querry
Chief
Office of Support Enforcement
Department of Social and Health Services
Post Office Box 9162-FU-11
Olympia, Washington 98504

Dear Mr. Querry:

This is in response to your letter of November 30, 1977. At your request, we have reviewed the preliminary injunction issued by the court in the case of *Berry v. Burdman.* This letter sets forth our views on the possible effects that compliance with the injunction could have on the State of Washington's continued eligibility for Federal Funding.

It is our preliminary view that compliance with the injunction issued by the court might cause the State difficulties in several ways. Among other possibilities, a question is raised as to: a possible audit penalty, a conformity hearing (which could cause a loss of all title IV-A funds), and a loss of Federal financial participation (with respect to specific payments).

With respect to the audit penalty, HEW is required by section 403(h) of the Act to reduce by 5 percent Federal funding under title IV-A for any State which is found to have a child support program which does not meet the requirements of title IV-D. By following the terms of the injunction, Washington could encounter difficulties in complying with the following requirements:

1. 45 CFR 302.32, which requires that child support payments be made to the IV-D agency;
2. 45 CFR 302.37 and 51, which require that child support be distributed by the State in a manner prescribed by section 457 of the Act; and
3. 45 CFR 303.6, which requires the State to have a system for identifying, within 30 days, those cases in which there is a failure of an absent parent to comply with the support obligation.

As indicated above, there could be a loss of all the State's Federal funding under title IV-A. Section 404 of the Act allows the Secretary of this Department, after notice and opportunity for hearing to the State, to terminate funding under title IV-A for failure to comply with any of the requirements of section 402 of the Act. This is so because of section 402(a)(26), which imposes a State plan requirement that applicants for, and recipients of, Aid to Families with Dependent Children cooperate with the State. Regulations at 45 CFR 232.12(b)(4) define such cooperation to include "* * * paying to the child support agency any child support payments received from the absent parent which are covered by such assignment." Federal regulations further require that failure to so cooperate must result in removing the needs of the non-cooperating recipient from the grant, and making any further payments in the case by means of protective payment.

If a compliance action is taken against a State, HEW has to determine whether the State is violating plan requirements. Section 404(a) provides that all Federal funding under title IV-A could be terminated if the Secretary finds such a violation.

Another problem involves ineligible recipients of Aid to Families with Dependent Children (AFDC). Under the Federal regulations previously cited, a recipient who fails to pay child support payments received from the absent parent to the child support agency is supposed to be ineligible to continue to receive AFDC. Therefore, if the State does not remove such a recipient from AFDC, the Federal share of assistance payments for the recipient could be subject to disallowance

The court order causes substantial problems in the administration of the State's title IV programs. If this injunction stays in effect, HEW would have to assess what action should be taken. While several possibilities are indicated above, it is possible that other or additional measures would be appropriate, depending on the circumstances.

Please advise if you have any further questions about this matter.

Sincerely yours,
Louis B. Hays
Deputy Director
Office of Child Support Enforcement

APPENDIX H

SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE REGIONAL
COMMISSIONER

June 20, 1980

Refer to: SFDX11-2

Gerald J. Thompson
Secretary
Department of Social and Health Services
Attn: Gladys McCorkhill, Director
Bureau of Income Maintenance
Mail Stop OB-44
Olympia, Washington 98504

Dear Mr. Thompson:

For some time, the staff of our respective departments have been discussing non-cooperation, Title *IV-A* sanctions and the treatment of child support received and retained by caretaker relatives. The purpose of this letter is to clarify the current Federal position with respect to the concerns that have emerged from those discussions.

The sanction for non-cooperation is addressed *in Federal law at Section 402(26)(b) of the Social Security Act and* in Federal regulations at 45 CFR 232.12(d) which require that the State Plan:

> "* * * shall provide that, if the caretaker relative fails to cooperate as required * * * the State or local agency will: (1) Deny assistance to the caretaker relative without regard to other eligibility factors; and (2) Provide payments as described in 234.60 of this chapter. Such assistance will be determined without regard to the needs of the caretaker relative."

This means, for example, that if a mother fails, without good cause, to cooperate by turning over to the IV-D agency child support payments received directly from the responsible absent parent, her needs must be removed from the assistance unit at the time non-cooperation is established. We find no provision in Federal law or Federal regulations that

precludes the State's prerogative to remove the caretaker's needs from the grant for a month and then include her needs with the assistance unit for the month following the month in which she restores cooperation. Such a time interval should provide the support enforcement agency the time needed to assure that the absent parent makes payment directly to the IV-D agency.

We need not address the *duration* of non-cooperation. The regulations at 45 CFR 232.12 state that the requirement of cooperation is met when the caretaker relative either agrees to cooperate or performs the acts of cooperation defined therein. Eligibility, as discussed in 45 CFR 206.10 and 233.90, is based on current *circumstances* rather than past or future ones.

Therefore, a non-cooperative caretaker relative restores cooperation by agreeing to cooperate henceforth; such a caretaker is deemed to be cooperative until such time as she fails to turn over child support money received thereafter to the IV-D agency. We do not envision that it would take the IV-D agency an inordinately long period of time to take the necessary steps to prevent the support payments from being given directly to the caretaker relative.

Further, there is no provision in either Federal law or regulation which permits or requires that an individual be sanctioned for failing to repay child support received directly under either parts A or D of Title IV.

We fail to find in Federal law or regulations anything which would require or permit *recoupment* through IV-D. However, it is Title IV-A policy that child support payments received directly by and retained by the caretaker relative are to be counted as income to meet need. This policy is also reflected in Quality Control instructions at Section E of Action Transmittal 78-31, dated August 4, 1978, and provides that if a Quality Control Reviewer finds that child support payments received directly and retained are not accounted for, there is an error. In Section F of the same

Action Transmittal, the Reviewer must verify the removal of the needs of the caretaker from the grant if the State has determined non-cooperation without good cause. If caretaker relatives retain such income and it is not counted to meet need because the agency is unaware of its receipt, the agency should recoup such "overpayment" through its recoupment policy if the State has elected such a policy.

The IV-A agency *must* count, as income to meet need, any support payments received by the recipient until the effective date for the recipient to begin submitting the money to the IV-D agency. The recipient is obligated to report to the IV-A agency when she begins giving the money to the IV-D agency because this is a change in circumstances.

In notifying the IV-A agency that the individual is not cooperating, the IV-D agency should forward a written copy of their findings to the IV-A agency. The IV-A agency should assess the situation and make a determination regarding cooperation; that agency should then notify the IV-D agency of the decision and the action taken.

Any of the changes in the assistance payment which result from various cooperative IV-D/IV-A recipient activities, including recoupment of overpayments resulting from unreported child support income retained by a recipient, must be carried out according to AFDC State Plan requirements. Child Support Enforcement agency activities with AFDC recipients do not exempt the IV-A agency from meeting the requirements of 45 CFR 205.10 with respect to notices or 45 CFR 206.10 with respect to changes in circumstances. It is imperative that both the IV-A and IV-D agencies be aware of this and specify in writing for their respective staffs the time frames which must be considered in their exchange of information and ensuing payment actions in order to avoid causing undue hardship to families.

I trust this policy clarification will assist your Department in meeting Federal requirements. Failure of the State to

conform to such requirements would necessitate this Department's citing of a question of compliance.

Sincerely,
DONALD C. SUTCLIFFE
Regional Commissioner

APPENDIX I

Refer to: SFDX11-2

August 8, 1980

Gerald J. Thompson
Secretary
Department of Social and Health Services
Mail Stop OB-44
Olympia, Washington 98504

Dear Mr. Thompson:

We are requesting a 90 day extension of the Federal review period for State Plan Transmittal 80-3, regarding assignment of support rights by AFDC recipients. We are unable to approve this Plan until court-ordered restraints arising out of the case of *Berry v. Burdman*, with respect to sanctions for recipients failure to cooperate, are resolved. At last reading, it appears that your Department may not be able to pursue in good faith the commitment found in the State Plan provisions in Section 2.7A and B of the Plan preprint which reflect the requirements found in Federal regulations at 45 CFR 232.2(a) and (b).

As we have been informed by our headquarters in Washington, D.C. that an Action Transmittal, to be issued jointly by the Office of Family Assistance and the Office of Child Support Enforcement, will be forthcoming in the near future to further clarify Federal requirements; we would prefer to delay action on this Plan until then rather than recommend disapproval. In the meantime, should the court modify its order in the *Berry* case, thereby permitting State compliance with Federal requirements, this Department should be furnished with a copy of the modification so that approval of Transmittal 80-3 could be effectuated.

Sincerely,
DONALD C. SUTCLIFFE
Regional Commissioner

cc.
Dave Anderson, BIM

RECEIVED
NOV 28 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,
Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondents ask leave to file the attached typewritten Brief In Opposition and to proceed in forma pauperis pursuant to Rule 46 and 28 U.S.C. §1915.

Respondents' affidavits in support of this motion are attached hereto.

Respondents were allowed to proceed in all courts below as representatives of a class of persons similarly affected, without imposition of costs or fees, in accordance with RCW 74.08.080. That statute provides in pertinent part that:

> In the event an appellant feels himself aggrieved by the decision rendered in the hearing provided for in RCW 74.08.070, he shall have the right to petition the superior court for judicial review in accordance with the provisions of chapter 34.04 RCW, as now or hereafter amended. Either party may appeal from the decision of the superior court to the supreme court or the court of appeals of the state: Provided, That no filing fee shall be collected of the appellant and no bond shall be required on any appeal under this chapter....

Respondents believe they are entitled to proceed in forma pauperis to this Court. Adkins v. DuPont, 335 U.S. 331 (1948).

Dated: This 26th day of November, 1980.

PATRICK HENRY McINTYRE
Counsel for Respondents

EVERGREEN LEGAL SERVICES
2018 Smith Tower
506 2nd Avenue
Seattle, Washington 98104

NO. 80-456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,
Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Maggie Lee Ferrill, being first duly sworn, depose and say that I am one of the Respondents in the above-entitled case; that in support of my motion to file a typewritten brief in opposition to the granting of a writ of certiorari and to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to the relief granted to me by the Supreme Court of the State of Washington.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of review by this Court are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER:

I am presently employed by the Port of Seattle, Pier 66, as a janitress. My take-home pay is approximately $696.24 per month. I am presently 62 years of age and hope to be able to work until I am 65 years old. My employer's address is: P.O. Box 1209
Seattle, WA 98111

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

ANSWER:

No.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

ANSWER:

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

ANSWER:

Yes. I am buying a house for which I pay a $141.00 per month house payment, and a $65.00 per month payment for repairs. I owe approximately $9,000 on the mortgage and approximately $1500 on the repair bill. In addition, the Washington State Department of Social and Health Services has a $1500 lien on the property. I think I have about $45,000 in equity, having made payments since 1968; however, this is my only security of any kind. I also am buying a 1977 Oldsmobile Brougham. The purchase price was approximately $3,900.00 at the date of purchase which was June 15, 1980. I made no down payment and owe about $3,400 on the car to the credit union. I don't believe I could sell the car at a profit.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER:

I am presently living alone and supporting myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Maggie Lee Ferrill

MAGGIE LEE FERRILL

SUBSCRIBED AND SWORN TO before me this 24th day of November, 1980.

Patrick McIntyre

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

NO. 80-456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,
Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Genevieve Gallow, being first duly sworn, depose and say that I am one of the Respondents in the above-entitled case; that in support of my motion to file a typewritten brief in opposition to the granting of a writ of certiorari and to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to the relief granted to me by the Supreme Court of the State of Washington.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of review by this Court are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER:

No; March 1971, $586.00 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

ANSWER:

No. My sole source of income is a public assistance (SSI) check of $281.00 per month.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

ANSWER:

Savings account - $100.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

ANSWER:

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER:

Barbara Gallow, daughter

Marvin Gallow, son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Genevieve Gallow
GENEVIEVE GALLOW

SUBSCRIBED AND SWORN TO before me this 21st day of November, 1980.

Patrick McNiteman
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

NO. 80-456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,
Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Bonnie Hedeen, being first duly sworn, depose and say that I am one of the Respondents in the above-entitled case; that in support of my motion to file a typewritten brief in opposition to the granting of a writ of certiorari and to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to the relief granted to me by the Supreme Court of the State of Washington.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of review by this Court are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER:

I am presently employed part time and receive $285.00 per month. My employer is Northwest Manufacturers Associates, 3805 108th N.E., Bellevue, Washington 98004.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

ANSWER:

My only other income is child support of $335 per month for my son. I started to receive this support two months ago.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

ANSWER:

Yes. Checking account - $200.00; the $200.00 is to be used next week for car repairs.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

ANSWER:

Yes. 1972 Toyota -- $1,000 value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER:

Derek H. Smith - son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Bonnie Hedeen
BONNIE HEDEEN

SUBSCRIBED AND SWORN TO before me this 25th day of November, 1980.

Patrick McIntyre
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

NO. 80-456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,
Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Patrick Henry McIntyre, being first duly sworn, depose and say:

That I am the counsel for Respondents, duly admitted to practice before this Court, and that I was involved on behalf of my firm in all proceedings below. I make this affidavit in support of Respondents' motion to file a typewritten brief in opposition and otherwise to proceed in forma pauperis, without being required to prepay fees, costs, or to give security therefore.

That, since the Petition was referred to me, I have personally attempted to contact each of the named Respondents, and have supervised the continuing efforts of other members of my firm to do so.

That, despite dilligent efforts, I am unable at the present time to submit affidavits of Mavis Berry and Carol Poe, although Mrs. Berry has lately been located and is expected to contact us in the near future.

That, according to information supplied by relatives, Mrs. Poe has left the State of Washington.

That I have no basis to conclude that either Mrs. Berry or Mrs. Poe no longer desires to be represented by this firm or that either Respondent lacks an interest in the outcome of these proceedings.

That I also have no basis on which to conclude that either Mrs. Berry or Mrs. Poe is financially able to pay the costs of this proceeding or to give security therefore, although the record reflects that Mrs. Berry voluntarily terminated her receipt of public assistance for some period of time in 1976.

That I will continue to make dilligent efforts to contact Mrs. Berry and Mrs. Poe and, should it become possible to do so, will promptly submit their affidavits or such other information as may be appropriate to the Court.

Patrick Henry McIntyre
PATRICK HENRY McINTYRE

SUBSCRIBED AND SWORN to before me this 26th day of November, 1980.

Joe Bower
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

NO. 80-456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,
Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Gertrude Y. Pierce, being first duly sworn, depose and say that I am one of the Respondents in the above-entitled case; that in support of my motion to file a typewritten brief in opposition to the granting of a writ of certiorari and to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to the relief granted to me by the Supreme Court of the State of Washington.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of review by this Court are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

ANSWER:

No. I was last employed in October, 1977, at which time I received approximately $475.00 per month in take-home wages.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

ANSWER:

No. My sole source of income has been public assistance. This month I received $515.00 and do not qualify for food stamps.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

ANSWER:

Yes, I have a savings account which contains less than $5.00. I have no checking account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

ANSWER:

Yes. I own a 1966 Oldsmobile. It is worth less than $250.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

ANSWER:

Toyka Lynn Pierce, daughter, age 17 yrs.
Darin Scott Pierce, son, age 16 yrs.
Clifford Ray Pierce, Jr., son age 13 yrs.

My daughter, Shari Kay Pierce, age 18, and her daughter, Ingrid Elizabeth Pierce, age 3, also reside in my home. Shari receives a partial public asssistance payment as she works part-time. However, she is unable to contribute for other than herself and her child.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Gertrude Y. Pierce
Gertrude Y. Pierce

SUBSCRIBED AND SWORN TO before me this 23rd day of November, 1980.

Patrick McIntyre
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____

RECEIVED
NOV 28 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-456

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GERALD J. THOMPSON, Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,
Petitioners,

v.

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF WASHINGTON

BRIEF IN OPPOSITION

EVERGREEN LEGAL SERVICES

PATRICK HENRY McINTYRE
2018 Smith Tower
516 Second Avenue
Seattle, Washington 98104
(206) 464-5933

Attorney for Respondents

QUESTIONS PRESENTED

1. Whether the Washington regulation defining "cooperation" for purposes of the state's AFDC-related child support enforcement program imposes a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards in violation of the Social Security Act and is therefore invalid under the Supremacy Clause.

2. Whether the Washington regulation, which imposes substantially more onerous recoupment provisions against persons who have received overpayments of AFDC as a result of their having failed to remit or to repay child support payments to the appropriate state agency, than are imposed against AFDC recipients overpaid for other reasons, thereby conflicts with the Federal regulations promulgated under the Social Security Act and is therefore invalid under the Supremacy clause.

3. Whether the Washington regulation, which imposes substantially more onerous recoupment provisions against persons who have received overpayments of AFDC as a result of their having failed to remit or to repay child support payments to the appropriate state agency than are imposed against AFDC recipients overpaid for other reasons, thereby denies equal protection of the laws to such persons in violation of the Fourteenth Amendment to the United States Constitution.

PARTIES

Respondents are correctly identified in the caption with the exception of Bonnie Hedeen, whose surname was misspelled throughout the state court proceedings.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
PARTIES	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	5
STATEMENT OF THE CASE	6
REASONS FOR DENYING THE PETITION.	13
A. THE DECISION OF THE WASHINGTON STATE SUPREME COURT DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT	13
B. THE QUESTIONS OF FEDERAL LAW WHICH PETITIONERS ASK THIS COURT TO DECIDE WERE NOT DECIDED BY THE WASHINGTON STATE SUPREME COURT. NOR ARE THEY SUFFICIENTLY IMPORTANT OR ADEQUATELY DEVELOPED TO WARRANT SETTLEMENT BY THIS COURT AT THE PRESENT TIME	18
C. THE DECISION OF THE WASHINGTON STATE SUPREME COURT CAN BE RESTED ON AN INDEPENDENT STATE GROUND	23
CONCLUSION	24
APPENDIX A	A-1
APPENDIX B	A-6
APPENDIX C	A-9
APPENDIX D	A-13

Table of Authorities
Cases

Page

Burns v. Alcala,
420 U.S. 575, 43 L.Ed.2d 469, 95 S.Ct. 1180 (1975). . 14

Carleson v. Remillard,
406 U.S. 598, 32 L.Ed.2d 352, 92 S.Ct. 1932 (1972). . 14

Carter v. University of Washington,
85 Wn.2d 391, 536 P.2d 618 (1975) 23

Darrin v. Gould,
85 Wn.2d 859, 540 P.2d 882 (1975) 23

DeFunis v. Odegaard,
82 Wn.2d 11, 507 P.2d 1169 (1973), vacated as moot,
416 U.S. 312, 40 L.Ed.2d 164, 94 S.Ct. 1704 (1974). . 23

King v. Smith,
392 U.S. 309, 20 L.Ed.2d 1118, 88 S.Ct. 2128 (1968) . 14

Lewis v. Martin,
397 U.S. 552, 25 L.Ed.2d 561, 90 S.Ct. 1282 (1970). . 17

Markham Advertising Co. v. State,
73 Wn.2d 405, 439 P.2d 248 (1968) 23

Miller v. Youakim,
440 U.S. 125, 59 L.Ed.2d 194, 99 S.Ct. 957 (1979) . . 14

Shapiro v. Thompson,
394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969). . 17

Shea v. Vialpando,
416 U.S. 251, 40 L.Ed.2d 120, 94 S.Ct. 1746 (1974). . 17

Townsend v. Swank,
404 U.S. 282, 30 L.Ed.2d 448, 92 S.Ct. 502 (1971) . . 14

Weber v. Aetna Casualty & Surety Co.
406 U.S. 164, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972). . 15

United States Constitutional Provisions

U.S. Const. Amend. XIV, §1 5,15

Federal Statutes and Regulations

42 U.S.C. § 602(a)(10) 5,14

42 U.S.C. § 602(a)(26) 13

42 U.S.C. § 603(h) 5

42 U.S.C. § 604 5

42 U.S.C. § 1316(a)(3) 5,20

Page

45 C.F.R. § 201.4 5,19

45 C.F.R. § 201.7 5,20

45 C.F.R. § 205.10(b)(2). 6,20

45 C.F.R. § 205.10(b)(3). 6,20

45 C.F.R. § 232.12. 5

45 C.F.R. § 233.20(a)(12)(i)(A) 6,10

45 C.F.R. § 233.20(a)(12)(i)(f) 6,10

45 C.F.R. § 234.60(a)(13) 5

U.S. SUPREME COURT RULES

Rule 17(1)(c) 13

Washington State Constitutional Provisions

Wa. Const. Art. I § 12 23

Washington State Statutes & Regulations

RCW 74.20.320 6,21

WAC 388-14-200(2)(d). 6,18

WAC 388-14-200(3) 6,7,18

WAC 388-14-200(4) 7,15,16,17,18

WAC 388-44-140(3) 6

WAC 388-44-145 6,10

WAC 338-44-145(3) 10

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The pertinent text is set forth in Appendix A.

The Social Security Act requires that "...aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals...." [42 U.S.C.§602(a)(10)(1977)]. The pertinent text is set forth in Appendix A.

The Social Security Act authorizes the Secretary of the Department of Health and Human Services to reduce by five percent federal funding to any state which is found to have a child support program which does not meet the requirements of the Act. [42 U.S.C.§603(h); 604(d)(1977)]. The pertinent text is set forth in Appendix A.

The Social Security Act provides that any state dissatisfied with a final determination of the Secretary of the Department of Health and Human Services under 42 U.S.C.§604 may file an appeal with the U.S. Court of Appeals. [42 U.S.C.§1316(a)(3)(1977)]. The pertinent text is set forth in Appendix A.

The Secretary of the Department of Health and Human Services has issued regulations which provide for a hearing and judicial review of his decision to impose a reduction in federal funding. [45 C.F.R. §201.4; §201.7]. The pertinent text is set forth in Appendix A.

The Secretary of the Department of Health and Human Services has issued regulations setting forth the circumstances under which a caretaker relative who fails to meet the eligibility requirements of 45 C.F.R. §232.12 shall "return to money payment status..." [45 C.F.R.§234.60(a)(13)]. The pertinent text is set forth in Appendix A.

The Secretary of the Department of Health and Human Services has issued regulations to govern the means that states participating in the AFDC program may employ to recover overpayments of assistance. [45 C.F.R. §233.20(a)(12)(i)(A); §233.20(a)(12)(i)(f)]. The pertinent text is set forth in Appendix A.

The Secretary of the Department of Health and Human Resources has issued regulations that provide for matching federal funds for any state which makes AFDC benefits to comply with a court order. [45 C.F.R. §205.10(b)(2) and (3)]. The pertinent text is set forth in Appendix A.

A state statute provides that an AFDC parent who does not remit support payments to the state agency incurs a support debt owing to the state. [RCW 74.20.320]. The pertinent text is set forth in Appendix B.

Petitioners have issued state regulations restricting the extent to which current assistance may be withheld for the purpose of recovering overpayments. [WAC 388-44-140(3); WAC 388-44-145]. The pertinent text is set forth in Appendix B.

Other applicable statutes and regulations are set forth in the Petition at pages 37-43. 1/

STATEMENT OF THE CASE

This case was initiated by Respondents to challenge the Washington State Department of Social and Health Services' interpretation of the "cooperation" requirements and sanctions passed by Congress under the Aid to Families with Dependent Children (AFDC) program. Pursuant to its policy, the Department imposed "noncooperation" sanctions against those AFDC recipient

---

1/ It should be noted that the Washington State Supreme Court expressly upheld the validity of WAC 388-14-200(2)(d) and WAC 388-14-200(3). See Appendix C to Petition at page 31. Respondents accordingly believe that the fourth question presented by the Petition is improperly framed.

parents or other caretaker relatives, [2] such as Respondents, who had received overpayments of public assistance because of their receipt of child support payments which were not deducted from their AFDC grants. The Department terminated assistance to such persons, thereby reducing the family's grant by the parent's portion of the grant, and named a protective payee to administer the children's portion of the grant. WAC 388-14-200(3). Petition, Appendix F, page 42.

During the period in which assistance was thus terminated, the parent's portion of the grant which was withheld was not credited towards reducing her [3] overpayment. Petition, page 4. Such parents could be returned to money payment status only by signing a repayment agreement with the Department's Office of Support Enforcement (OSE) requiring monthly payments of at least 10% of the amount of overpayment, irrespective of the parent's ability to pay this monthly amount. WAC 388-14-200(4). Appendix F to Petition, page 42. If the parent defaulted on any payments, then she could be returned to money payment status only by paying the entire amount of the overpayment remaining in one lump sum to OSE. Otherwise, she would remain without assistance indefinitely and the children's portion of the grant would continue to be paid indefinitely to the protective payee. WAC 388-14-200(4). Appendix F to Petition, page 42.

The practical application of the policy which Respondents challenged is well-illustrated by the Findings made by the trial court with respect to Respondent, Gertrude Pierce. Although the pertinent findings concerning Mrs. Pierce and other Respondents are set forth in Appendix A to the Petition, at pages 9-11, they

---

2 / Some of the Respondents are parents, while others are caretaker relatives. For the sake of convenience and brevity, this brief will utilize "parents" as an inclusive term.

3 / Because most of the parents or caretaker relatives affected are women, as are all named Respondents, the feminine pronoun will be used throughout.

are highly material to the consideration of the questions presented. For this reason and for ease of reference the findings relating to Mrs. Pierce are set forth in full below:

1. Named plaintiffs and class members are former, present, and future AFDC recipients who have been, are being, or may be taken off the AFDC grant, with the remaining portion of the family's grant being paid to a protective payee, including those recipients who have or may sign agreements with the Department's Office of Support Enforcement (OSE) promising to repay the amount of support monies not turned over, because of their failure to turn over or have turned over support payments to OSE.

2. Plaintiff Gertrude Pierce and her four minor children started receiving public assistance benefits under the AFDC program in 1970.

3. Beginning in 1973, Ms. Pierce's former husband began paying $100 per month in child support payments to the County Clerk in California who in turn transferred the funds to the Snohomish County Clerk.

4. Because Ms. Pierce had assigned her child support rights to OSE, the Snohomish County Clerk sent the child support payments directly to OSE beginning in December of 1973.

5. During a brief period in October, 1975, Ms. Pierce was off of public assistance during which time OSE notified the Snohomish County Clerk that the child support payments were to be made directly to Ms. Pierce because Ms. Pierce was no longer on public assistance.

6. On November 7, 1975, Ms. Pierce got back on public assistance and informed OSE of that fact.

7. Not having been informed by OSE, the Snohomish County Clerk continued to send the child support payments directly to Ms. Pierce.

8. When she received the check in December of 1975, Ms. Pierce called the county clerk to inquire about the check.

9 . Ms. Pierce was told that the money was for child support, but was not otherwise told what to do with it although she advised the clerk that she was back on public assistance.

10. Ms. Pierce retained the December, 1975 check and subsequent checks which continued to be sent to her through June, 1976.

11. OSE notified the Snohomish County Clerk that support payments for July and subsequent months were to be sent directly to OSE; such payments have been sent directly to OSE since the notification.

12. The local office sent a notice to Ms. Pierce stating that Ms. Pierce was not "cooperating" with the Department and her needs would be deleted from the grant with the remaining portion of the grant to be paid through a protective payee.

13. Ms. Pierce asked for an administrative hearing challenging the Department's actions and the hearing was held on September 1, 1976.

14. The defendant upheld the local office's action, even though the local office at the fair hearing, conceded that there was no fraud involved and that the payments received by Ms. Pierce were caused by Departmental error in failing to have the Snohomish County Clerk send the child support payments directly to OSE.

15. Ms. Pierce has petitioned for review of the Department's decision to the Superior Court.

16. In accordance with the Department's policy, Ms. Pierce's portion of the grant was not being credited to the debt she allegedly owed until, upon Ms. Pierce's Motion for Stay of Administrative Decision, the Superior Court ordered the defendant to credit Ms. Pierce's monthy portion of the grant to the debt she allegedly owes.

The further findings made by the State trial court show that the regulation in question was applied in the same fashion to the other named Respondents, and to class members, with similar results.

The State trial court held the regulation to be invalid, inter alia, on the ground that it denied equal protection under the State and Federal Constitutions, which decision was affirmed outright by the State Supreme Court. Therefore, Respondents believe that a full appreciation of the contrast between the above-described procedures and the State and Federal regulations governing the recovery of overpayments in all other

situations is highly material to the Court's consideration of the questions presented. These well-established and carefully-defined procedures for recovering overpayments received by AFDC recipients can be briefly summarized. In the case of non-fraudulent overpayments -- those caused by Department error or an innocent mistake by the recipient, as in the case of Mrs. Pierce -- the Department assesses an overpayment against the recipient which becomes a debt owing to the state. However, the Department cannot in such a case recover the debt by reducing the family's AFDC grant or other public assistance benefits such as medical coupons. WAC 388-44-145, Appendix B, page A-7; 45 C.F.R. §233.20(a)(12)(i)(A), Appendix A, page A-4.

In cases where the overpayment is caused by recipient fraud, the Department assesses a debt of 125% of the amount overpaid which may be recovered by reducing the family's grant. WAC 388-44-145, Appendix B, page A-7. Basically, the maximum monthly deduction that can be imposed is 10% of the grant. To determine the exact percentage of the deduction (up to 10%), the Department must first assess the family's situation on a case-by-case basis, "so as not cause undue hardship." WAC 388-44-145(3), Appendix B, page A-7; 45 C.F.R. §233.20(a)(12(i)(f), Appendix A, page A-4.

Had the Department applied these well-established procedures, Mrs. Pierce would not have been subjected to the deletion of her needs from the grant and the distribution of her childrens' assistance through a protective payee. She would instead have continued to receive her full grant along with medical coupons and other assistance, since the overpayment was not occasioned by any fault or fraud on her part. She would have owed a debt to the Department, to be paid when she was no longer in need of assistance, when she would be financially able to do so.

If, on the other hand, the overpayment had resulted from Ms. Pierce's fraud, the Department would then effect recovery by taking mandatory monthly deductions of up to 10% of her grant if to do so would not cause undue hardship to the family. Moreover, 10% of a grant would often be substantially less than 10% of the amount of the overpayment. This is illustrated by the case of class member Carol Poe [4], who was alleged to have received an overpayment of $1,050 and therefore required to pay $105 per month. By way of contrast, 10% of the present [5] grant for a three-person household such as the Poe family is $41.30. [6]

The proceedings below are essentially as set forth in the Petition at pages 3-6. Of particular note is the fact that the case was presented to the State Supreme Court on virtually unchallenged [7] findings of fact, including those to which

---

4 / Though Mrs. Poe's case is useful for illustration, it should be noted that none of the Plaintiffs including Mrs. Poe, were found to have engaged in any fraudulent actions.

5 / Precise information concerning the 1976 AFDC grant levels is not readily available. Grants have, however, been increased by a cost of living factor each succeeding year.

6 / Administrative decisions in the cases of various class members, which were presented both to the State trial court and the State Supreme Court, further establish the extent and typicality of this difference in treatment. According to the decision in her case, attached as Appendix C, Class Member Deborah Moran retained child support payments in the total sum of $1,200 in reliance upon advice given her by the Department. Pursuant to its non-cooperation policy, the Department subsequently terminated Mrs. Moran from the AFDC grant, thereby reducing the grant from $270 to $196, and conditioned her future eligibility upon repayment at the rate of $120 per month. At her administrative hearing, Mrs. Moran agreed to repay the $1,200, even though she had been misled by the Department, but noted that she could not possibly do so at the rate of $120 per month when her entire grant, which was the sole source of income for herself and her child, was only $270 per month. The decision held nonetheless that nothing less than $120 per month could be accepted.

7 / As they do here (Statement of the Case, Petition at page 3) Petitioners below challenged only Findings 66 and 70, neither of which is essential to this Court's determination of the questions presented.

reference has been made above. It is also especially significant for purposes of these proceedings to note that the State Supreme Court affirmed the trial court, to use the words of the Petitioners, "without qualification." Statement of the Case, Petition at page 6. The trial court had, in turn held that the challenged regulation violated the Social Security Act, federal regulations promulgated under the Act and the equal protection and due process clauses of the United States Constitution and Washington State Constitution. Conclusions of Law, Appendix A to Petition, at pages 17-18.

As indicated by the Petition (Statement of the Case, at page 5), Petitioners were initially enjoined from imposing the challenged sanctions against any recipient who "fails or has failed to turn over support payments to the Department's Office of Support Enforcement ...." (emphasis added). However, in response to the State's expressed concern that this inadvertently broad language might preclude it from imposing sanctions against recipients who presently have support payments in their possession, Respondents proposed and the trial court has entered an agreed Order amending the Findings, Conclusions, and the Order on Summary Judgment. As amended, these documents now make clear that Petitioners are enjoined from imposing the challenged sanctions only against any recipient who "has failed to turn over support payments ..." The agreed Order, and the pertinent provisions, as amended, are set forth in Appendix D.

As correctly indicated by their complete omission from Petitioners' Statement of Case, various letters directed to the Petitioners by officials of the Department of Health, Education and Welfare [8], (Appendices G, H, and I to the Petition, pages

---

8 / That agency has been redesignated the Department of Health and Human Services (D.H.H.S.) and will be so identified in the remaining portions of this brief.

44-51), are not material to the consideration of the questions presented. These letters were not part of the record, were not considered by the trial court in the summary judgment, (Appendix B to Petition, at pages 21-26), and were accordingly not considered by the State Supreme Court. To Respondents' knowledge, and so far as appears from the Petition, D.H.H.S. has neither threatened nor taken any action to withhold any portion of federal matching funds, but rather has indicated that a formal Action Transmittal will be forthcoming in the near future to clarify the federal requirements. Appendix I to Petition, at page 51.

REASONS FOR DENYING THE PETITION

A. THE DECISION OF THE WASHINGTON STATE SUPREME COURT DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Denial of the Petition at this time is proper because Petitioners have neither claimed nor shown any "conflict with applicable decisions of this Court." Rule 17(1)(c).

As correctly noted by the Washington State Supreme Court, the Social Security Act makes cooperation a condition of AFDC eligibility.[9] Indeed, this is the express purpose and effect of 42 U.S.C. §602(a)(26) (1977).[10] As a result, one's eligibility to receive AFDC is directly determined by her level of cooperation. Whether or not her particular conduct constitutes "cooperation" and therefore fulfills this particular condition of eligibility, depends in turn upon the nature of her actions as measured against those actions required by state and Federal laws which define "cooperation."

---

9 / 93 Wn.2d 17, 21, 604 P.2nd 1288 (1980); Appendix C to Petition, at page 31.

10 / Appendix E to Petition, page 37.

The Act also provides, however, that "aid to families with dependent children shall ... be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. §602 (a)(10) [11] (emphasis added). Relying upon and construing the above mandate, this Court has frequently had occasion to review various state laws and regulations restricting eligibility for AFDC. In so doing, it has repeatedly reaffirmed the principle -- necessitated by the Supremacy Clause -- that states may not deny aid to otherwise eligible individuals by imposing conditions of eligibility not contained in the Act or its implementing regulations. King v. Smith, 392 U.S. 309, 20 L.Ed.2d 1118, 88 S.Ct. 2128 (1968); Townsend v. Swank, 404 U.S. 282, 30 L.Ed.2d 448, 92 S.Ct. 502 (1971); Carleson v. Remillard, 406 U.S. 598, 32 L.Ed.2d 352, 92 S.Ct. 1932 (1972).

In Burns v. Alcala, 420 U.S. 575, 43 L.Ed.2d 469, 95 S.Ct. 1180 (1975), this Court said: "King, Townsend, and Carleson establish only that once the federal standard of eligibility is defined, a participating state may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." Burns v. Alcala, supra at 580; Accord, Miller v. Youakim, 440 U.S. 125; 59 L.Ed. 2d 194, 99 S.Ct.957 (1979).

Adhering strictly to the standards established by this Court, the State Supreme Court carefully examined the state regulations in light of those conditions of eligibility authorized by the Act and by applicable Federal regulations. The court properly concluded that Department regulations requiring assignment of support money received from an absent parent, including the requirement that such payments be remitted to the appropriate state agency, were valid because they were

---

11 / The pertinent text is set forth in Appendix A.

entirely consistent with Federal requirements. [12] Finding, however, that the additional regulations [13] pertaining to repayment requirements were "not imposed or authorized by either the Social Security Act or the HEW regulations," the State Supreme Court properly concluded that those regulations were invalid. [14]

Respondents respectfully submit that the constitutional principle previously established by this Court and correctly applied below is an extremely important one with continuing vitality. It is a principle which has served long and well to protect the interests of the needy, while at the same time fairly accommodating important state and federal interests under the Constitution. This case accordingly presents no apparent basis for the Court to reconsider or overrule its prior decisions.

This Court has made it equally clear that a state may not, consistent with the Equal Protection Clause, [15] discriminate against a class of persons unless the "classification bears some rational relationship to a legitimate state purpose." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 197, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972).

In the context of this case as it was presented to the courts below, the Department was faced with a situation in which the Respondents had received more money than they were entitled

---

12 / 93 Wn.2d 17, 21-2, 604 P.2d 1288; Appendix C to Petition, at page 31.

13 / WAC 388-14-200(4); Appendix F to Petition, at page 42.

14 / 93 Wn.2d 17, 22, 604 P.2d 1288; Appendix C to Petition at page 33.

15 / The pertinent text is set forth in Appendix A.

to receive due to their receipt of child support payments which were not deducted from their grants, whether through their own or the Department's fault. Respondents' cases were thus indistinguishable from other overpayment cases in which a recipient receives more money than she is entitled to receive due to her receipt of wages, Social Security benefits, veterans benefits, or some other type of income. And, as set forth in the Statement of Case above, the responsible federal agency has lawfully established the limited procedures which the states are required to employ in recovering overpayments. As evidenced by the findings of the trial court, [16] the child support payments were in every case being directly remitted to the appropriate state agency when the Department imposed the repayment requirements upon the respective Respondents. The Department's goal, therefore, was to recover the overpayments which had already occurred -- an interest precisely identical to that involved in all other overpayment cases. Yet, the Department did not apply its normal recoupment rules, but instead imposed the far more onerous requirements contained in WAC 388-14-200(4).

No analytical or practical reason has been offered to this Court to justify the different treatment given to Respondents. Nor are any such reasons contained in the record. Once the child support payments are being remitted to the appropriate state agency, the ultimate purpose of the support enforcement provisions contained in the Act has been completely satisfied; further "cooperation" is neither necessary nor possible.

As specifically recognized by the State Supreme Court [17] the AFDC program exists, "...to furnish financial assistance and

---

16 / Appendix A to Petition, pages 9-14.

17 / 93 Wn.2d 17, 23, 604 P.2d 1288; Appendix C to Petition at page 32-33.

rehabilitation and other services ... to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life ..." 42 U.S.C §601 (1977). A rule such as WAC 388-14-200(4), requiring immediate repayment of the full amount, utterly defeats this purpose by making it impossible for many parents to retain or to regain eligibility for assistance.

To the extent the decisions below held that WAC 388-14-200(4) is invalid because it is inconsistent with federal recoupment requirements and denies equal protection [18/], Respondents submit that these holdings are consistent with and strongly supported by prior decisions of this Court. This Court has invalidated state regulations because they were inconsistent with the Act, although the regulations did not relate directly to eligibility. Lewis v. Martin, 397 U.S. 552, 25 L.Ed.2d 561, 90 S.Ct. 1282 (1970); Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974). And, even were the Act expressly to authorize the unjustifiable discrimination which the State Supreme Court invalidated, such discrimination could not be permitted to stand under the decisions of this Court. "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." Shapiro v. Thompson, 394 U.S. 618, 641, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969).

---

18 / The trial court's decision, which was affirmed by the State Supreme Court, concluded that the regulation also denied equal protection under the state constitution. The significance of this fact is discussed in Section C below.

B. THE QUESTIONS OF FEDERAL LAW WHICH PETITIONERS ASK THIS COURT TO DECIDE WERE NOT DECIDED BY THE WASHINGTON STATE SUPREME COURT. NOR ARE THEY SUFFICIENTLY IMPORTANT OR ADEQUATELY DEVELOPED TO WARRANT SETTLEMENT BY THIS COURT AT THE PRESENT TIME.

In their Petition, petitioners argue that the state of Washington may not be able to meet the requirements of the Social Security Act and federal regulations if the ruling of the Washington State Supreme Court is allowed to stand. Failure to meet federal requirements, in turn, would subject the state to possible fiscal sanctions.

Petitioners misconstrue the State Supreme Court's ruling. The Court's ruling upheld state regulations 19 / which require AFDC recipients to cooperate by assigning their support rights to the state and by remitting any support payments to the state support collection agency. The State Supreme Court found these regulations to be consistent with the Social Security Act and federal regulations which set forth the cooperation requirements imposed on AFDC parents.

The State Supreme Court, however, struck down a state regulation 20 / which required AFDC parents to repay in ten monthly installments the full amount of support retained by the parents, in order to be eligible for AFDC. If the parent could not or did not make the monthly payments, she was deemed to be "not cooperating" and, therefore, was ineligible for AFDC benefits. The State Supreme Court held that such a policy was invalid since it violated the Social Security Act and federal regulations. The Court properly found that neither the Act nor the regulations require immediate repayment as a condition of eligibility for AFDC benefits. Thus, contrary to Petitioners' contention that

---

19 / WAC 388-14-200(2)(d) and (3). See Appendix F to Petition, page 42.

20 / WAC 388-14-200(4).See Appendix F to Petition, page 42.

the ruling might force the state to violate federal requirements, the ruling merely requires the state to comply with valid federal requirements.

Petitioners rely upon a June 30, 1980 letter from the Regional Commissioner of D.H.H.S., [21] suggesting that the letter sets forth that agency's formal position on the issues which are sought to be raised. However, even assuming that it was a formal and final statement, Respondents find no conflict between the decision below and the D.H.H.S. letter. With regard to the precise issue ruled on by the Court -- the validity of requiring repayment as a condition of eligibility -- the letter states:

> Further, there is no provision in either Federal law or regulation which permits or requires that an individual be sanctioned for failing to repay child support received directly under either parts A or D of Title IV. [22]

It is significant to note that D.H.H.S. has not taken or threatened any action against the state. The August 8, 1980 letter sent by D.H.H.S. states that any action will have to await an Action Transmittal which is forthcoming and which will clarify the federal requirements. [23]

In the unlikely event that D.H.H.S. were subsequently to conclude that the State Supreme Court's ruling may not be reconciled with federal requirements, the state will be fully entitled to challenge that finding. The federal regulations provide for a hearing to be held no later than 60 days from the time of notice. 45 C.F.R. §201.4, Appendix A, page A-2,3. If the hearing decision is unfavorable to the state, it may appeal to the U.S. Court of

---

[21] Appendix H to Petition, at page 47. As pointed out above, this letter was not part of the record below.

[22] Appendix H to Petition, at page 48.

[23] Appendix I to Petition, page 51.

Appeals and ultimately to the U.S. Supreme Court. 42 U.S.C. §1316(a)(3), Appendix A, page A-2; 45 C.F.R. §201.7, Appendix A, page A-3.

In such proceedings, any alleged conflict between the state's plan and federal requirements would be argued extensively, upon a full record, including the forthcoming Action Transmittal. Moreover, the state could raise additional issues which are peculiar to state-federal conflicts under the Social Security Act. For instance, 45 C.F.R. §205.10(b)(2) and (3) provides that federal matching funds under the AFDC program are available to a state for the following items:

> (2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.
>
> (3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order. (emphasis added)

This regulation clearly states that federal matching funds are available for a state to carry out a court order. This regulation, on its face, appears to provide an absolute defense against any possible federal fiscal sanctions against the State of Washington for carrying out a lawful court order.

Moreover, in any hearing and appeals involving the state and D.H.H.S., two additional developments would be considered which were not before the State Supreme Court. Shortly after the briefs were submitted to the State Supreme Court, the Washington Legislature enacted a statute, at the Department's request, which requires the state to treat support monies retained by AFDC parents (and not deducted from their grants) as a debt owing to

the state. RCW 74.20.320. [24] The statute further authorizes the state to recover such debts by using relatively simple and inexpensive but highly effective administrative, as opposed to judicial, collection procedures. The state implemented this approach in late 1979 and it has remained in effect since that time.

The statute's characterization of the support monies retained by the AFDC parent as a debt is completely proper, and it is precisely the position which has been urged by Respondents throughout this litigation. D.H.H.S. has raised no objection to the state using this approach. Thus, all the parties involved -- AFDC parents, D.H.H.S., and the state -- appear to agree with the state's present approach as mandated by RCW 74.20.320. This additional development further suggests that any conflict between the state and D.H.H.S. is highly speculative if not totally unfounded. In any event, this additional factor would certainly be fully considered in the course of the hearings and appeals authorized by the Act and federal regulations.

Yet another development has occurred since the State Supreme Court handed down its ruling. In order to clarify an ambiguity in the trial court's order, Respondents joined the state in seeking amendments to the trial court's findings, conclusions, and order on summary judgment. These amendments [25] make clear that the trial court's injunction does not prohibit the state from imposing the non-cooperation sanctions against AFDC parents who are presently not cooperating. The amendments -- which were made subsequent to the latest D.H.H.S. letter to the state -- thus negate a major concern expressed by D.H.H.S. The injunction

---

24 / The statute is set forth in Appendix B, page A-6.

25 / The background of the amendments is discussed more fully in Respondents' Statement of the Case at page 9, supra. The agreed Order, and the pertinent provisions, as amended, are set forth in Appendix D.

as amended is consistent with the State Supreme Court's ruling which authorizes the state to impose non-cooperation sanctions against AFDC parents who are presently not cooperating.

Respondents respectfully submit that the issue of possible federal sanctions against the state, while interesting and not without some importance, is prematurely raised at this time, and has not been adequately developed on this state of the record. The extensive procedures set up by the Act and federal regulations to resolve state - federal conflicts appear to be the most appropriate as well as the best-suited forum in which to develop and consider such an issue, should it actually arise. Although Petitioners assert that the State Supreme Court's ruling addresses an important question of federal law which could affect all states participating in the AFDC program, [26] the State Supreme Court's ruling actually involved a very narrow issue: the validity of one portion of one unique state regulation. Moreover, as explained in the following section of this brief, the ruling appears to have been grounded at least in part upon a state constitutional provision.

It appears doubtful, given these somewhat unusual factors, that the decision of the Washington State Supreme Court will significantly affect prevailing practice in other states, particularly since Petitioners do not suggest that any other state employs the same or similar procedures. For these reasons, Respondents do not believe the case is of sufficient importance to warrant review by this Court.

---

26 / Petition, at page 8.

C. THE DECISION OF THE WASHINGTON STATE SUPREME COURT CAN BE RESTED ON AN INDEPENDENT STATE GROUND

As emphasized in Respondents' Statement of the Case, at page 9 supra, the state regulation at issue was held to deny equal protection under the Constitution of the State of Washington. In relevant part, Article 1, §12 of the Washington State Constitution provides:

> Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Although the Washington Supreme Court has declared the protection extended by this provision to be substantially identical to that provided by the Equal Protection Clause, it has also reserved the power to construe the provision more liberally under certain circumstances. Thus, the Court has said:

> Const. art. 1, § 12, the state's version of the equal protection clause, has been construed in a manner similar to that of the equal protection clause of the Fourteenth Amendment. DeFunis v. Odegaard, 82 Wn.2d 11, 37 n.16, 507 P.2d 1169 (1973), vacated as moot, 416 U.S. 312, 40 L.Ed.2d 164, 94 S.Ct.1704 (1974); Markham Advertising Co. v. State, 73 Wn.2d 405, 427, 439 P.2d 248 (1968). Such construction, however, is not automatically compelled. Const. art. 1, §12 may be construed to provide greater protection to individual rights than that provided by the equal protection clause. Carter v. University of Washington, 85 Wn.2d 391, 536 P.2d 618 (1975).

Darrin v. Gould, 85 Wn. 2d 859, 868, 540 P.2d 882 (1975).

Respondents believe and have argued above that the discrimination in question cannot withstand the appropriate test under the Equal Protection Clause. However, should it be determined that the Equal Protection Clause does not protect the rights in question, it is significant to note that those rights have arguably been preserved under the laws of Washington.

CONCLUSION

The Petition should be denied.

Respectfully submitted.

PATRICK HENRY McINTYRE
Attorney for Respondents

EVERGREEN LEGAL SERVICES
2018 Smith Tower
516 Second Avenue
Seattle, Washington 98104
(206) 464-5933

Attorney for Respondents

November 26, 1980

APPENDIX A

AMENDMENT XIV, U.S. CONSTITUTION EQUAL PROTECTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law in which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C §602 STATE PLANS

(a)(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals;

42 U.S.C. §603 PAYMENT TO STATES

(h) Notwithstanding any other provision of this chapter, the amount payable to any State under this part for quarters in a fiscal year shall with respect to quarters beginning after December 31, 1976, be reduced by 5 per centum of such amount if such State is found by the Secretary as the result of the annual audit to have failed to have an effective program meeting the requirements of section 602(a)(27) of this title in any fiscal year beginning after September 30, 1976 (but, in the case of the fiscal year beginning October 1, 1976, only considering the second, third, and fourth quarters thereof).

42 U.S.C. §604 REDUCTION OF PAYMENTS

(d) After December 31, 1976, in the case of any State which is found to have failed substantially to comply with the requirements of section 602(a)(27) of this title, the reduction in any amount payable to such State required to be imposed under section 603(h) of this title shall be imposed in lieu of any reduction, with respect to such failure, which would otherwise be required to be imposed under this section.

42 U.S.C. §1316 JUDICIAL REVIEW

(a)(3) Any State which is dissatisfied with a final determination made by the Secretary on such reconsideration or a final determination of the Secretary under section 304, 604, 804, 1204, 1354, 1384, 1396c, or 1397b of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in section 2112 of Title 28.

45 C.F.R. §201.4 ADMINISTRATIVE REVIEW

Pursuant to section 1116 of the Act, any State dissatisfied with a determination of the Administrator pursuant to §201.3(e) or (f) with respect to any plan or amendment may, within 60 days after the date of receipt of notification of such determination, file a petition with the Regional Commissioner, or with respect to the medical assistance program under title XIX, Regional Medicaid Director asking the Administrator for reconsideration of the issue of whether such plan or amendment conforms to the requirements for approval under the Act and pertinent Federal requirements.

Within 30 days after receipt of such a petition, the Administrator shall notify the State of the time and place at which the hearing for the purpose of reconsidering such issue will be held. Such hearing shall be held not less than 30 days nor more than 60 days after the date of notice of such hearing is furnished to the State, unless the Administrator and the State agree in writing on another time. For hearing procedures, see Part 213 of this chapter. A determination affirming, modifying or reversing the Administrator's original decision will be made within 60 days of the conclusion of the hearing. Action pursuant to an initial determination by the Administrator described in such §201.3(e) or (f) that a plan or amendment is not approvable shall not be stayed pending the reconsideration, but in the event that the Administrator subsequently determines that his original decision was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

45 C.F.R. §201.7 JUDICIAL REVIEW

Any State dissatisfied with a final determination of the Secretary pursuant to §201.4 or §201.6(a) may, within 60 days after it has been notified of such determination, file with the U.S. Court of Appeals for the circuit in which such State is located a petition for review of such determination. After a copy of the petition is transmitted by the clerk of the court to the Secretary, the Secretary thereupon shall file in the court the record of proceedings upon which such determination was based as provided in section 2112 of title 28, United States Code. The court is bound by the Secretary's findings of fact, if supported by substantial evidence. The court has jurisdiction to affirm the Secretary's decision, or set aside in whole or in part, or, for good cause, to remand the case for additional evidence. If the case is remanded, the Secretary may thereupon make new or modified findings of fact, and may modify his previous determination. The Secretary shall certify to the court the transcript and record of the further proceedings. The judgment of the court is subject to review by the Supreme Court of the United States upon certiorari or certification as provided in 28 U.S.C. 1254.

45 C.F.R. §234.60 PROTECTIVE PAYMENTS

(a)(13) For cases in which a caretaker relative fails to meet the eligibility requirements of §§232.11 or 232.12 of this chapter by failing to assign rights to support or cooperate in determining paternity and securing support, the State plan must provide that only the requirements of paragraph (a)(7) and (9)(ii) of this sectin will be applicable. For such cases the entire amount of the assistance payment will be in the form of protective or vendor payments. These protective or vendor payments will be terminated, with return to money payment status, only upon compliance by the caretaker relative with the eligibility requirements of §§232.11 and 232.12 of this chapter.

45 C.F.R. §233.20 RECOUPMENT OF OVERPAYMENTS

(a)(12)(i) Recoupment of overpayments of assistance, including certain overpayments resulting from assistance paid pending hearing decisions.

(A) The State may not recoup any overpayment previously made to a recipient:

(1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments: except that,

(2) Where such overpayments were occasioned or caused by the recipient's willful withholding of information concerning his income, resources or other circumstances which may affect the amount of payment, the State may recoup prior overpayments from current assistance grants irrespective of current income or resources.

45 C.F.R. §233.20 RECOUPMENT OF OVERPAYMENTS

(a)(12)(i)(f) Any recoupment of overpayments permitted by paragraph (a)(12)(i)(A)(2) of this section may be made from available income and resources (including disregarded, set-aside or reserved items) or from current assistance payment or from both. If recoupments are made from current assistance payments, the State shall, on a case-by-case basis, limit the proportion of such payments that may be deducted in each case, so as not to cause undue hardship to recipients.

45 C.F.R. §205.10 FEDERAL MATCHING FUNDS

(b) Federal financial participation is available for the following items:

(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision of or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.

(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

APPENDIX B

RCW 74.20.320 SUPPORT DEBT

Whenever a custodian of children, or other person, receives support moneys paid to them which moneys are paid in whole or in part in satisfaction of a support obligation which has been assigned to the department pursuant to 42 U.S.C. §602(A)(26)(a) or RCW 74.20.330 or to which the department is owed a debt pursuant to RCW 74.20A.030, the moneys shall be remitted to the department within eight days of receipt by the custodian or other person. If not so remitted the custodian or other person shall be indebted to the department as a support debt in an amount equal to the amount of the support money received and not remitted.

By not paying over the moneys to the department, a custodial parent or other person is deemed, without the necessity of signing any document, to have made an irrevocable assignment to the department of any support delinquency owed which is not already assigned to the department or to any support delinquency which may accrue in the future in an amount equal to the amount of support money retained. The department may utilize the collection procedures in chapter 74.20A RCW to collect the assigned delinquency to effect recoupment and satisfaction of the debt incurred by reason of the failure of the custodial parent or other person to remit. The department is also authorized to make a set-off to effect satisfaction of the debt by deduction from support moneys in its possession or in the possession of any clerk of the court or other forwarding agent which are paid to the custodial parent or other person for the satisfaction of any support delinquency. Nothing in this section authorizes the department to make set-off as to current support paid during the month for which the payment is due and owing.

WAC 388-44-140 INVOLUNTARY REPAYMENT OF OVERPAYMENT

(3) Except in cases involving substantiated fraud, it is the policy of the department not to seek involuntary repayment from a former recipient whose income and resources do not exceed departmental standards for determining public assistance eligibility.

WAC 388-44-145 MANDATORY GRANT DEDUCTION

(1) An overpayment shall be recouped by mandatory deduction from future continuing assistance grants only when the department has made a determination that the overpayment resulted from recipient fraud as defined in WAC 388-44-020.

(2) If an overpayment is the result of recipient fraud and if the recipient has cash, bank accounts, or marketable securities which he refuses to use in full or partial satisfaction of an overpayment, a monthly deduction of up to one hundred percent of future grant(s) shall be established until such time as the amount of the grant(s) the recipient would be otherwise eligible to receive equals the value of the cash, bank accounts, or marketable securities which have been withheld.

(3) When deductions have been made pursuant to subsection (2) and the recipient still owes money, or when subsection (2) does not apply:

(a) The department shall, on a case-by-case basis, limit the amount of the monthly deduction so as not to cause undue hardship. The deduction shall not exceed ten percent of the recipient's total monthly requirements unless the recipient requests a larger deduction in writing.

(b) Deleted.

(c) Deleted.

(d) When a recipient is in a nursing home, intermediate care facility, or hospital, a monthly deduction may be made against the clothing and incidental grant to the recipient. A monthly deduction shall not be made against the vendor payment to the nursing home or intermediate care facility.

(e) The grant shall be suspended when the monthly deduction is equal to or more than the grant which would have been paid had no overpayment occurred.

(f) A deduction shall not be made from a noncontinuing general assistance-employable grant to liquidate an overpayment.

(4) A letter confirming the repayment plan shall be sent to the recipient. The letter shall state the percentage of monthly requirements to be deducted. It shall state the amount of the current grant before and after the deduction is made, the date the deduction begins, the total amount of overpayment to be recouped by grant deduction, and the approximate number of months the deduction will be made.

APPENDIX C

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

OFFICE OF HEARINGS

* * * *

In Re:	)	DOCKET NO. 1076A133
DEBORAH KAY MORAN,	)	ADMINISTRATIVE DECISION
Appellant.	)	

A hearing in the above entitled matter was conducted by DAVID HOTCHKIN, a duly qualified Hearings Examiner, on the third day of November, 1976, in Mountlake Terrace, Washington. The Appellant represented herself, and the respondent was represented by Charles Hunter.

ISSUES

1. Appellant appeals the Department determination to terminate her portion of her Aid to Families with Dependent Children (AFDC) assistance grant for alleged non-cooperation with the Office of Support Enforcement.

2. Appellant appeals the Department determination to establish a protective payee for her child's portion of the AFDC assistance grant presently paid to her.

FINDINGS OF FACT

I.

The Appellant requested a fair hearing within thirty (30) days of receipt of the Department decision here appealed.

II.

Appellant has received AFDC assistance for herself and her family, a two person household, since August, 1975.

III.

During most of this same period of time from September,

1975, through August, 1976, Appellant received $100 per month child support.

IV.

When Appellant applied for assistance from the Department Appellant signed an assignment of rights to collect and receive child support for her child to the Department's Office of Support Enforcement. Appellant received no copy of this agreement. She was advised that her grant would be adjusted to compensate for the receipt of these additional funds until Support Enforcement notified her that her full grant was approved. No notice of such approval has been received by Appellant and the Department is offering no evidence to show or imply that such ever was sent.

V.

In August, 1976, the Office of Support Enforcement became aware that these support funds were not being received from Appellant and notified her to pay these same funds to that office.

VI.

Appellant did forward said support money to that office upon being advised of this requirement and continues to do so to the date of this hearing.

VII.

The Office of Support Enforcement, however, levied an additional demand on Appellant requiring her to repay the $1200 support money she collected at not less than $120 per month.

VIII.

Appellant is willing to repay the $1200 support funds she received but insists the $270 per month assistance grant she receives is insufficient to support a repayment schedule of $120 per month.

IX.

Because Appellant is unable and unwilling to repay at $120 per month, the Office of Support Enforcement has notified the Mountlake Terrace Office that Appellant is not cooperating, and that office has proposed the termination of assistance of Appellant's portion of the AFCD grant and establishment of a protective payee for her child's portion.

CONCLUSIONS OF LAW

I.

There is jurisdiction to hear the above entitled proceedings pursuant to Washington Administrative Code (WAC) 388-08-002.

II.

WAC 388-24-109 (Revision 119) requires all applicants for, or recipients of, AFDC assistance to cooperate with the Office of Support Enforcement as required by WAC 388-14-200.

WAC 388-14-200 (2) (Revision 119) requires cooperation in the obtaining of support payments, including immediate remittance of all support payments received by the applicant or recipients from any person to the Office of Support Enforcement. The facts in this case clearly show that Appellant has not cooperated in this regard fully.

III.

WAC 388-14-200 (4) (Revision 119) requires that in the event support monies are not promptly remitted, the Office of Support Enforcement may enter into an agreement to repay the amount owed at payments of not less than 10% of the total amount outstanding. This agreement must be made, clearly, without regard to such individual abilities to pay or consideration of continuing support for others dependent on such income as is available. Therefore, it is necessary for the Office of Support Enforcement to employ this 10% rule and both parties are not free to negotiate an agreement

which takes into consideration such factors as ability to pay and ongoing support obligations.

IV.

Since the Department allegation of non-cooperation has been sustained, it is required that a protective payee be established for the administration of the AFDC grant to Appellant's child. WAC 388-14-200 (Revision 119), WAC 388-24-109 (Revision 119), and WAC 388-33-453 (Revision 120).

DECISION

The Department actions to terminate Appellant's portion of the AFDC grant to her family, and, to establish a protective payee for the administration of her child's portion of the AFDC grant are affirmed.

DATED at Olympia, Washington, this 18th day of January, 1977. Signature of Loren Keely, Acting as Designee and on Behalf of the Secretary, Department of Social and Health Services.

/s/
LOREN KEELY

APPENDIX D

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE, on behalf of themselves and others similarly situation, Plaintiffs, v. MILTON BURDMAN, Acting Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement, Defendants.	NO. 823412 ORDER AMENDING SUMMARY JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs, by their attorneys, Deborah Maranville and Tony Lee, and Defendants, by their attorney, Walter E. White, Assistant Attorney General, agree that the Summary Judgment and Findings of Fact and Conclusions of Law are to be amended.

The plaintiffs concede that failure by an AFDC recipient to turn over support payments to OSE constitutes failure to cooperate in obtaining support payments as defined in WAC 388-14-200 (2)(d), if the recipients still have the support payments in question.

Based upon this agreement, it is hereby

ORDERED that the Summary Judgment entered on November 14, 1978, is amended by deleting the words "fails or" on page 3, lines 8 - 9 and lines 25 - 26.

IT IS FURTHER ORDERED that the findings of fact and

Deborah Maranville
Tony Lee
Evergreen Legal Services
200 Alaska Building
618 2nd Avenue
Seattle WA 98104
(206) 464-5911

conclusions of law entered November 14, 1978, are amended by deleting the words "fails or" on page 10, lines 9 - 10 and lines 27 - 28.

DONE IN OPEN COURT this 9 day of Oct., 1980.

Nancy Ann Holman
Judge Nancy Ann Holman

Presented by:

Tony Lee
DEBORAH MARANVILLE
TONY LEE
Attorneys for Plaintiffs

Notice of presentation waived;
approved for entry.

Walter E. White per agreement
WALTER E. WHITE
Attorney for Defendants

CONCLUSIONS OF LAW

4. Defendants' policy of deleting the needs of the caretaker relative from AFDC grant and paying the family's remaining portion to a protective payee because the recipient allegedly or actually has failed to turn over support payments to the Department's Office of Support Enforcement after an assignment of support rights is made, or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained, violates the Social Security Act (42 U.S.C. §601 et seq), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

6. Defendants, their successors, agents, and employees are permanently enjoined from deleting the needs of a caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient has failed to turn over support payments to the Department's Office of Support Enforcement, or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained.

SUMMARY JUDGMENT, PAGE 3

Paragraph 4. ... Defendants' policy of deleting the needs of the caretaker relative from the AFDC, grant and paying the family's remaining portion to a protective payee because the recipient allegedly or actually has failed to turn over support payments to the Department's Office of Support Enforcement after an assignment of support rights has been made, or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained violates the Social Security Act (42 U.S.C. §601 et seq), federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions.

Paragraph 6. Defendants, their successors, agents, and employees are permanently enjoined from deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining portion to a protective payee because the recipient has failed to turn over support payments to the Department's Office of Support Enforcement or because the recipient fails or has failed to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained.

Office Supreme Court, U.S.
FILED
MAY 4 1981
ALEXANDER STEVAS,
CLERK

No. 80-456

In the Supreme Court of the United States

OCTOBER TERM, 1980

GERALD J. THOMPSON, ETC., ET AL., PETITIONERS

v.

MAVIS BERRY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
King v. *Smith*, 392 U.S. 309	6
Townsend v. *Swank*, 404 U.S. 282	6
Statutes and regulations:	
Social Security Act, 42 U.S.C. 201 *et seq.*:	
42 U.S.C. 601	6
42 U.S.C. 602(a)(26)	2, 6
42 U.S.C. 602(a)(27)	2
42 U.S.C. 651 *et seq.*	2
42 U.S.C. 654(4)	2
42 U.S.C. 654(5)	2
42 U.S.C. 655	2
Wash. Admin. Code (1975):	
Section 388-14-200	4
Section 388-14-200(2)(d)	3, 4
Section 388-14-200(3)	3, 4
Section 388-14-200(4)	3, 4
45 C.F.R.:	
Section 232.12(a)	3
Section 232.12(b)(4)	3, 6
Sections 232.40-232.49	3
Section 234.60	3
Section 302.32(a)	2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-456

GERALD J. THOMPSON, ETC., ET AL., PETITIONERS

v.

MAVIS BERRY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1a. In 1975, Congress amended the Aid to Families with Dependent Children ("AFDC") program to require that each state that chooses to participate

in the AFDC program must operate a Child Support and Establishment of Paternity program pursuant to an approved plan. See 42 U.S.C. 602(a)(27) and Title IV-D of the Social Security Act, 651 *et seq.* The child support program is designed to "enforc[e] the support obligations owed by absent parents to their children, [to] locat[e] absent parents, [to] establish[] paternity, and [to] obtain[] child support." 42 U.S.C. 651. Like the AFDC program itself, the child support program provides substantial federal reimbursement to participating states on a matching funds basis. 42 U.S.C. 655.

In order to provide a legal basis for enforcing support obligations and establishing paternity under the child support program, each applicant for or recipient of AFDC benefits must assign to the state any rights he may have to receive support from any other person. 42 U.S.C. 602(a)(26). All support payments covered by an assignment must be made to the state's child support agency. See 42 U.S.C. 654(5); 45 C.F.R. 302.32(a).[1] The state, in turn, must enforce any support obligations that have been assigned to it, and must undertake to obtain child support and to establish paternity in the case of children born out of wedlock. 42 U.S.C. 654(4). Concomitantly, AFDC applicants and recipients must, in order to retain AFDC eligibility, "cooperate" with the state with regard to paternity and child support matters. 42 U.S.C. 602(a)(26). In particular, regulations promulgated by the Secretary of Health and Human Services provide that the applicant's or recipient's duty to cooperate includes the duty to "[p]ay[] to

[1] Generally, support payments made to the state do not affect the level of AFDC benefits, but rather offset the state's AFDC costs.

the child support agency any child support payments received from the absent parent after an assignment" of those support rights has been made to the state. 45 C.F.R. 232.12(b)(4). If an AFDC recipient or applicant fails to cooperate with the state, the recipient or applicant is ineligible for AFDC benefits unless he demonstrates "good cause" for the failure to cooperate (45 C.F.R. 232.12(a), 232.40-232.49), and any aid to which his child is entitled must be provided in the form of protective payments (45 C.F.R. 234.60).

b. The State of Washington participates in the AFDC and Child Support Enforcement programs pursuant to approved State plans.[2] The State's regulations require AFDC applicants and recipients to provide information concerning support payments owed to or received by them, and immediately to remit support payments that they receive directly to the State's Office of Support Enforcement. Wash. Admin. Code § 388-14-200(2)(d) (1975) (reprinted at Pet. App. 42). Failure to comply with these regulations constitutes lack of cooperation and results in ineligibility for AFDC assistance and protective payments to the recipient's or applicant's children. Wash. Admin. Code § 388-14-200(3) (1975). Under Wash. Admin. Code § 388-14-200(4) (1975), an applicant or recipient who has failed promptly to submit direct support payments to the Office of Support Enforcement and who is therefore ineligible for AFDC benefits may enter into a written agreement with the State to remit the support payments in monthly installments of not less than 10% of the support payments that were improperly retained. If, however,

[2] Although HHS generally approved the State's plan, it did not approve the State's regulations at issue in this case.

the applicant or recipient thereafter fails to make a monthly payment required by the agreement or promptly to remit any other direct support payment, he can reestablish his eligibility only by repaying the entire amount of support payments in question. Wash. Admin. Code § 388-14-200(4) (1975).

2. In 1977, respondents filed this suit in the Superior Court of King County, Washington, challenging the State's regulations regarding AFDC recipient and applicant "cooperation." On November 14, 1978, the court granted respondent's motion for summary judgment. The court held that the State's policy of withholding the applicant's or recipient's benefits and of paying the remaining portion of the AFDC grant to a protective payee whenever a recipient or applicant failed to turn over support payments to the Office of Support Enforcement violates the Social Security Act, the federal regulations, and the Equal Protection and Due Process Clauses of the state and federal constitutions (Pet. App. 9-20). Accordingly, the court enjoined (Pet. App. 21-26) petitioners from enforcing Wash. Admin. Code § 388-14-200 (1975).

On appeal, the Supreme Court of Washington reversed in part and affirmed in part (Pet. App. 27-34). The court concluded that Sections 388-14-200 (2)(d) and (3) of the State's regulations, which provide for deletion of the benefits of a non-cooperating applicant or recipient and protective payment of the remaining AFDC benefits, are consistent with the Social Security Act and the applicable federal regulations and do not violate either the State or United States Constitution. The court held, however, that Section 388-14-200(4) is void because it establishes an additional requirement of eligibility for AFDC

benefits not provided in and inconsistent with the Act and the Secretary's regulations (Pet. App. 31-33). The court pointed out that "the harsh provision of the [State's] rules requiring immediate repayment of the full amount [of the support payment] most often makes it impossible for the recipient to regain eligibility" (*id.* at 33). Similarly, the court described the State's 10% repayment agreement rule as a "cruel regulation * * * tantamount to an adhesion contract in its most oppressive form" (*ibid.*).

3. Petitioners challenge the ruling of the Supreme Court of Washington holding invalid certain aspects of the State's AFDC child support payment regulations. But petitioners acknowledge that their "sole objective has been to attempt to satisfy applicable federal requirements entitling the state to federal financial participation" in the AFDC program (Pet. 6). They further explain that, in the absence of a "final binding statement" by the Secretary, they are uncertain how to comply with the decision below (*id.* at 7). On March 27, 1981, however, the Social Security Administration and Office of Child Support Enforcement of the Department of Health and Human Services jointly issued Action Transmittal No. 81-7, reprinted at App., *infra*, 1a-18a, which governs the treatment of assigned child support payments received directly and retained by AFDC applicants and recipients. This HHS policy statement, which has been approved by the Secretary, describes in detail the appropriate procedures and practices to be followed by petitioners and, in particular, directs that a "repayment schedule must be reasonably related to the recipient's income and resources" (App., *infra*, 14a). In light of this development, petitioners' "sole objective" has been satisfied and this case presents no recurring issue warranting this Court's review.

In any event, the decision of the court below, which petitioners recognize involves an issue of "first impression" (Pet. 8), is correct and does not warrant further review. The State's 10% repayment schedule requirement and full repayment on default policy fail to take into account the applicant's or recipient's income and resources and the size of the debt. These inflexible and harsh rules could preclude an individual from ever cooperating under 42 U.S.C. 602(a)(26) and 45 C.F.R. 232.12(b)(4) and are thus inconsistent with the remedial purposes of the Act (see 42 U.S.C. 601), as well as the specific HHS Action Transmittal referred to above. Hence, as the Supreme Court of Washington concluded, the State's regulations impermissibly impose stricter and different standards of eligibility for AFDC recipients and applicants who have failed to cooperate than those established by the Act and the Secretary's regulations. See *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971); *King* v. *Smith*, 392 U.S. 309, 333 (1968).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

APPENDIX

DEPARTMENT OF HEALTH AND
HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF FAMILY ASSISTANCE
WASHINGTON, D.C. 20024
AND
OFFICE OF CHILD SUPPORT ENFORCEMENT
ROCKVILLE, MD 20852

Program Instruction

ACTION TRANSMITTAL
SSA-AT-81-7 (OFA)
OCSE-AT-81-7
March 27, 1981

TO: STATE AGENCIES ADMINISTERING PUBLIC ASSISTANCE PLANS APPROVED UNDER TITLE IV-A AND CHILD SUPPORT ENFORCEMENT PLANS APPROVED UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT AND OTHER INTERESTED ORGANIZATIONS, AGENCIES AND INDIVIDUALS

SUBJECT: Treatment of Assigned Child Support Payments Received Directly and Retained by AFDC Applicants or Recipients

REFERENCES: Section 402(a)(26) of the Social Security Act, 45 CFR 232.11, 232.12, 233.20(a)(1), (3), and (12), 302.31, 302.32, and SSA-AT-78-31 (OFA), issued August 4, 1978

PROGRAM APPLICABILITY: AFDC and Child Support Enforcement

EFFECTIVE DATE: Upon issuance

PURPOSE: The purpose of this Action Transmittal is to provide joint Federal policy and procedures for handling situations in which AFDC applicants or recipients receive and retain child support payments from an absent parent when there is a valid assignment under 45 CFR 232.11.

DEFINITION: For purposes of this Action Transmittal, the following definitions apply: (1) "direct payment" means a child support payment from an absent parent covered by an assignment to the State under 45 CFR 232.11 which is received directly by an AFDC applicant or recipient. (2) "IV-A income State" means a State in which retained direct payments are treated as income by the IV-A Agency. (3) "IV-D recovery State" means a State in which retained direct payments are subject to recovery by the IV-D agency under its responsibility to secure support from legally liable persons as required by 45 CFR 302.31(a)(2).

BACKGROUND: Although most child support paid by absent parents on behalf of AFDC recipient children is paid by these parents to IV-D agencies, there are situations in which applicants or recipients of AFDC receive these payments directly from the absent parent. For example, in some States the court order establishing the child support obligation must be changed before the absent parent can be required under the assignment to pay the child support to the IV-D agency rather than to the family. Until this change can be made, the family may continue to receive the support payments. In recognition of the possibility of direct payment situations, Federal regulations at 45 CFR 232.12(b)(4) require that, as a

condition of cooperation in obtaining support, an applicant or recipient must pay to the IV-D agency "any child support payments received from the absent parent after an assignment under § 232.11 has been made."

While the applicant's or recipient's responsibility with respect to direct payments is clear under Federal regulations, there have been numerous questions from both IV-A and IV-D agencies as to the appropriate action to take when the applicant or recipient fails to turn over direct payments as required. In order to answer these questions, the Office of Family Assistance (OFA) and the Office of Child Support Enforcement (OCSE) have developed this joint instruction.

Both OFA and OCSE wish to emphasize the importance of interagency cooperation between IV-A and IV-D agencies at all levels with respect to direct payment situations. Prompt action and effective communication on the part of both agencies is essential if problems related to direct payments are to be minimized.

CONTENT: I. GENERAL STATEMENT OF POLICY

States have repeatedly asked whether the language of 45 CFR 232.12(b)(4), which provides that cooperation in obtaining support includes "paying to the child support agency any [assigned] child support payments received from the absent partner . . . ," requires recipients to remit direct payments received and retained in the past as well as those received in the current period. It is the position of OFA and OCSE that this cooperation requirement applies to

all direct payments that have not been counted as income by the IV-A agency, including those which may have been received and retained by a recipient in the past.

Research by both OFA and OCSE indicates that there are essentially two methods being used by the States to handle cases in which direct child support payments are retained by AFDC applicants or recipients. In one group of States, retained direct payments are considered as income to meet need by the IV-A agency, and thus may involve a reduction in the recipient's grant. In a second group of States, IV-D agencies engage in recovery of direct payments, and the AFDC grant remains the same. In order to provide maximum flexibility, we authorize both methods in these instructions. However, to ensure that recovery methods are administered efficiently and that recipients are not subject to duplicate recovery systems, States may implement only one or the other of the two alternative methods. In this context, it should be noted that there is no mechanism under current Federal law or regulation which permits IV-A agencies to either collect assigned child support payments or transfer any recouped assistance payments to IV-D.

In order to accommodate those States which opt for IV-D recovery of direct payments, a change in the IV-A State plan will be necessary. The Office of Family Assistance will therefore issue a change to the IV-A State plan preprint which will require IV-D recovery States to indicate their choice of this option. No IV-A plan amendment will be required for States in which retained direct payments continue to be regarded as income under the IV-A State plan.

The remainder of this Action Transmittal is divided into three sections, numbered II through IV. Section II applies to IV-A and IV-D agencies in all States. Section III, in turn, provides specific instructions which apply only to IV-A income States. Finally, Section IV provides specific instructions which apply only to IV-D recovery States.

II. INSTRUCTIONS FOR ALL STATES

A. *What the IV-A Agency Must Do at Initial Determination of Eligibility When an AFDC Applicant Receives Direct Payments.*

When an applicant for AFDC in any State informs the IV-A eligibility worker at the time of initial determination of eligibility that child support is being received by the family on behalf of an applicant child, the following actions must be carried out by the IV-A agency.

(1) Treat direct payments as income until authorization of the first assistance payment.

The IV-A agency must consider the support payments as income for purposes of determining eligibility. If the family is eligible for assistance, any child support received prior to authorization of the first payment in accordance with the IV-A State plan, must be budgeted as income. The purpose of treating direct payments as income in this initial determination period is to provide sufficient time for the referral of the case to the IV-D agency before child support payments are directed there. In subsequent months, support payments covered by an assignment that are paid to the IV-D agency are not considered as income in computing the amount of the assistance payment to which a recipient is entitled.

(2) Inform the applicant.

In all AFDC cases in which deprivation is due to the absence of a parent from the home, the individual applying for assistance must be informed that support payments received from an absent parent after AFDC is authorized must be paid to the IV-D agency or the applicant's needs can be removed from the grant and payments can be made to the family using the protective or vendor payment provisions of 45 CFR 234.60. This notice is particularly important where a IV-A applicant is receiving support directly at the time of application for AFDC. The IV-A agency must inform the applicant of the exact procedure for turning directly received support payments over to the IV-D agency. This is important because these direct payments must be turned over to the IV-D agency until the IV-D agency can arrange to formally redirect the support payments made by the absent parent from the family to itself. It is advisable that the IV-A agency give the applicant a telephone number of the IV-D agency to be contacted if there is any question about what to do when a direct payment is received. In addition, IV-A agencies in all States must advise applicants who are receiving direct payments that they must inform the IV-D agency whenever there is a lapse in these payments.

(3) Provide notice to IV-D agency.

As required by 45 CFR 235.70, the IV-A agency must, of course, notify the IV-D agency that aid is being furnished with respect to a child "whose eligibility for AFDC is based on continued absence of a parent from the home." In direct payment cases, the IV-A agency must include in this notification any

information it has acquired concerning the direct child support payments the family is receiving.

(4) Make determinations regarding non-cooperation.

Whenever a IV-D agency refers a case involving retained direct payments to the IV-A agency for a determination regarding non-cooperation, the IV-A agency must determine whether the recipient has failed to cooperate as required at 45 CFR 232.12. If a recipient is found to be non-cooperative, the caretaker's needs are removed from the grant and the protective or vendor payment provisions of 45 CFR 234.60 are applied. Although application of this sanction for failure to cooperate results in a net reduction of the recipient family's AFDC grant by the amount which would otherwise be provided to meet the caretaker's needs, the monthly reduction of this amount from the AFDC check has no effect on the debt created by any retained direct payments. This applies to direct payments retained prior to the application of the sanction as well as to direct payments retained during the sanction period.

B. *IV-D Agency Responsibility for Arranging to Have Payments Sent to the IV-D Agency.*

(1) Formally redirect payments to IV-D.

The primary responsibility of the IV-D agency with respect to direct payments cases is to take prompt action to require the absent parent to pay child support to the IV-D agency rather than to the family. When notified by the IV-Agency that a direct payment situation exists, the IV-D agency must proceed immediately to require, in accordance with State law, that the absent parent make support payments to the IV-D agency rather than to the family. This will pre-

vent retention of direct payments by precluding the direct payment from occurring.

(2) Arrange for the recipient to submit direct payments to IV-D.

In cases in which it is not immediately possible for the IV-D agency to formally redirect the child support payments from the family to the agency, it will be necessary to establish interim procedures for the recipient to send direct payments to the IV-D agency. The IV-D agency must inform the IV-A agency about these procedures so that IV-A can carry out its responsibility to explain to applicants and recipients how to handle support payments which are received directly from the absent parent. The IV-D agency should provide a telephone number for recipients to call in the event any questions arise about what to do with direct payments.

III. INSTRUCTIONS FOR IV-A INCOME STATES

The instructions of this section apply only to States in which IV-A agencies regard retained direct payments as income.

A. *IV-A Agency Responsibilities in IV-A Income States.*

When the IV-A agency learns, either at redetermination of eligibility or at any other time after the initial authorization of payment, that a recipient is or has been receiving and retaining direct support payments after the initial authorization of payment, the following actions must be carried out by the agency.

(1) Inform the recipient.

The IV-A agency must remind the recipient who has retained any direct payments of his or her obligation to turn any future direct payments over to the IV-D agency. The recipient should be advised that retaining a future direct payment can result in the removal of the caretaker's needs from the grant and application of the protective or vendor payment provisions of 45 CFR 234.60.

(2) Count current support as income.

The amount of any direct payments received and retained by the recipient in the current month in a IV-A income State must be counted as income, and the amount budgeted accordingly. Despite the assignment under 45 CFR 232.11, the current direct payment is income because it is available to meet the needs of the family when it is retained. Treatment of all retained direct payments as income must continue until one of the following three changes in circumstances occurs:

(a) the recipient begins submitting the direct payments to the IV-D agency as required, or

(b) the IV-D agency succeeds in getting the payments formally redirected; or

(c) the absent parent ceases making payments.

(3) Treat as overpayments direct payments retained in the past.

An overpayment of assistance occurs for each month in which a direct payment is retained by the recipient and not counted by the IV-A agency to reduce the AFDC grant. If permitted by the IV-A State plan,

the IV-A agency should proceed with recoupment in accordance with that plan.

(4) Determine if recipient is cooperative.

Because the recipient may have violated the requirements of 45 CFR 232.12(b)(4) by retaining one or more direct payments, the IV-A agency must proceed to determine if he or she failed to cooperate in obtaining support. Retention of even a single direct payment may be found to constitute an act of non-cooperation which must be sanctioned. If the IV-A agency determines that the recipient did not cooperate, then his/her needs are removed from the grant and a protective or vendor payment made on behalf of the child as required by 45 CFR 232.12(d). At any time the sanction is applied, the notice and hearing requirements of 45 CFR 205.10 must be met.

(5) Restore the cooperative recipient to the grant.

In cases in which the sanction is applied because of failure to cooperate in obtaining support, the caretaker's portion of the grant will be restored when: (1) a demonstrative act of cooperation (in this case, submittal by the recipient of a subsequent direct payment to the IV-D agency) has occurred, or, (2) the circumstance which fostered the act of non-cooperation (in this case the fact that the absent parent does not pay support directly to the IV-D agency) has been resolved (for example, by a change in the court order to require redirection of the support payments from the recipient to the IV-D agency). During the period when the caretaker's needs are removed from the grant, the IV-A agency must continue to budget

any current retained direct payments in accordance with the instructions above.

(6) Respond to notice from IV-D that payments are being retained.

There may be situations in which the IV-A agency does not learn from the applicant or recipient that direct payments are being received and retained, but instead the IV-D agency discovers the situation and notifies the IV-A agency. In this case, the procedures outlined above under IV(A)(1) through (4) would apply. First, the current direct payment must be budgeted as income. Second, direct payments retained in the past which have caused overpayments should be recouped in accordance with the IV-A State plan. Third, the IV-A agency must proceed to determine whether non-cooperation exists under the requirements of 45 C.F.R. 232.12.

B. *IV-D Responsibilities in IV-A Income States*

(1) Contact the recipient in current month.

Although the IV-A agency in the IV-A income State has been instructed above to carry out certain actions when recipients retain direct payments, it may be possible for the IV-D agency in these States to resolve the situation when it first occurs by contacting the recipient to clarify the requirement that direct payments be turned over. Under the instructions of this Action Transmittal, the IV-D agency in a IV-A income State must attempt to contact a recipient in the month in which an expected payment is not received from the recipient in order to ascertain if the recipient received the child support payment and, if so, to clarify the requirements of cooperation and to secure

the release of the direct payment to the IV-D agency. However, after this initial contact with the recipient, the IV-D agency's role in the IV-A income State is limited to reporting the circumstance to the IV-A agency as provided in the next paragraph.

(2) Report to IV-A.

The IV-D agency must report to the IV-A agency whenever it discovers a case in which a direct payment or payments have been retained by a recipient so that the IV-A agency can carry out its responsibilities. The IV-D agency must also report to the IV-A agency whenever a recipient who has been reported as non-cooperative for keeping direct payments begins to cooperate by sending these payments to the IV-D agency as required.

IV. INSTRUCTIONS FOR IV-D RECOVERY STATES

The instructions of this section apply only to States in which IV-D agencies are responsible for recovery of retained direct payments from recipients. Only those direct payments which have not been treated by the IV-A agency as income are subject to IV-D recovery.

A. *IV-D Agency Responsibilities in IV-D Recovery States.*

(1) Discovery and documentation of facts.

When the IV-D agency contacts an absent parent for an apparent failure to pay child support, it may learn that the absent parent has been sending payments directly to the recipient. The first step for the IV-D agency is to document carefully the fact that support

payments have been received and retained by the recipient. This must include a careful review of IV-D records to be certain the recipient did not submit the support payments, as well as obtaining documentation from the absent parent—preferably copies of the cancelled support payment checks themselves—to verify that the absent parent has made support payments directly to the family and to ascertain the total amount retained by the recipient.

(2) Notice to the recipient.

The recipient must be afforded prior written notice that the IV-D agency intends to recover direct payments retained by the recipient. The recipient must be provided the following:

(a) an explanation of the recipient's responsibility to turn over direct payments as a condition of cooperation in obtaining support, as well as the procedure for determining non-cooperation and the sanction for non-cooperation;

(b) a detailed list of the direct payments which the IV-D agency believes have been retained by the recipient, including the dates and amounts of these payments as well as a description of any documentary evidence (such as photocopies of the checks) which the IV-D agency possesses;

(c) an explanation that repaying retained direct payments to the IV-D agency according to a signed repayment plan is a condition of cooperation;

(d) a proposal for a repayment plan between the recipient and the IV-D agency;

(3) IV-D interview with the recipient.

The recipient must be provided the opportunity for an informal meeting with the IV-D agency for the following purposes:

(a) the IV-D agency can explain in detail to the recipient the exact nature and amount of the debt the recipient has incurred with the State by retaining direct payments;

(b) the recipient may review the State's documentary evidence and submit any documentation or other interpretations to challenge any portion of the State's claim against him or her; and

(c) the recipient and the IV-D agency can resolve any inconsistencies and enter into an agreement to repay the amounts retained by the recipient.

(4) The repayment agreement:

The written agreement entered into between the recipient and the IV-D agency should acknowledge the recipient's debt, establish a repayment schedule according to IV-D agency guidelines and be legally enforceable. The repayment schedule must be reasonably related to the recipient's income and resources, including the AFDC grant, and to the size of the debt. The IV-D agency repayment guidelines must be flexible enough to avoid undue hardship when a recipient has very limited income or resources with which to repay the retained child support and also to avoid unreasonably long repayment times in relation to the amount of retained support.

(5) Referral for determination regarding non-cooperation.

If the recipient fails to sign the agreement to repay, the IV-D agency must report all the facts of the case to the IV-A agency for a determination regarding non-cooperation. If the recipient enters into a repayment agreement and then defaults, *i.e.*, fails to make a payment under the terms of the agreement, the IV-D agency must report the matter to the IV-A agency for a determination regarding non-cooperation. This requirement should not be read to mandate referral of the case to the IV-A agency unless the IV-D agency believes that referral is the best way to secure the recipient's compliance with the repayment agreement.

(6) IV-D actions during period when sanction for non-cooperation is in effect.

If a recipient is found by the IV-A agency to be non-cooperative, and the sanction for non-cooperation is consequently applied, the IV-D agency continues to have a responsibility to get current direct payments either formally redirected from the absent parent to the IV-D agency, or sent to the IV-D agency by the recipient. However, if the recipient receives and retains direct payments during the period in which the sanction for non-cooperation is in effect, the IV-A agency is instructed below to count these direct payments as income. Therefore, the IV-D agency is precluded from recovery of any direct payments received and retained by the recipient during the sanction period. Nevertheless, any direct payments which are not counted by the IV-A agency as income (i.e., direct payments received and retained after authorization of the initial AFDC payment but before removal

of the caretaker's needs from the grant and application of the protective payee provisions because of failure to cooperate) constitute a debt owed to the State which is subject to IV-D recovery methods as provided in this Action Transmittal.

(7) IV-D actions if the recipient subsequently signs agreement or makes payment.

If a recipient who fails to sign a repayment agreement with the IV-D agency has been reported to the IV-A agency for a determination regarding non-cooperation, but subsequently consents to sign, the IV-D agency must immediately notify the IV-A agency that the recipient is cooperating as required. If a recipient who fails to make payments consistent with a repayment agreement has been reported to the IV-A agency for a determination regarding non-cooperation, but subsequently begins making regularly scheduled payments as required in the agreement, the IV-D agency must immediately notify the IV-A agency that the recipient is cooperating as required. Regularly scheduled payments cannot include amounts that can be categorized as balloon payments or amounts that would be due as a result of an acceleration clause. These types of provisions are not permitted in any repayment agreements authorized by this action transmittal for as long as an individual remains eligible for AFDC.

(8) Tretament of recovered direct payments.

Any direct payments recovered by a IV-D agency in accordance with these instructions must be distributed as normal child support collections under the requirements of 45 CFR 302.32 and 302.51. These

collections are also subject to the incentive payments provisions of § 302.52.

B. *IV-A Agency Responsibilities in IV-D Recovery States.*

(1) Determine if recipient is cooperative.

When the IV-D agency refers a direct payments case to the IV-A agency for a determination regarding cooperation, the IV-A agency must proceed to determine if the recipient has failed to cooperate in obtaining support according to the requirements of 45 CFR 232.12. In reaching its determination, the IV-A agency must consider both the circumstances surrounding the original retention of the direct payments (e.g., willful withholding vs. agency failure to inform the recipient of the responsibility to turn direct payments over to the IV-D agency) and the recipient's refusal to agree to, or comply with, a repayment schedule.

(2) Apply the sanction for failure to cooperate.

If a recipient is found to be non-cooperative, the penalty for failure to cooperate as provided at 45 CFR 232.12(d) must be applied. This sanction consists of removing the caretakers needs from the grant and providing assistance to the eligible child through the protective or vendor payment provisions of 45 CFR 234.60. Before this sanction is applied, the IV-A agency must meet the notice and hearing requirements of 45 CFR 205.10.

(3) Treat direct payments retained during the sanction period as income.

During the period when the sanction for failure to cooperate is in effect, the IV-A agency must count as

income any direct payments received and retained by the recipient. The IV-D agency has been instructed above that direct payments which are treated as income by the IV-A agency are not subject to IV-D recovery.

(4) Lift the sanction.

In a direct payments case in which the recipient has been found to be non-cooperative because of a failure to agree to the terms of a repayment schedule, cooperation is restored at the point at which the recipient signs the agreement. If the recipient's non-cooperation was caused by a failure to honor the terms of a repayment agreement after having entered into such an agreement, cooperation is restored at the point at which the recipient makes a regularly scheduled payment according to the the terms of that agreement.

INQUIRIES TO: SSA Assistant Regional Commissioners for Family Assistance and OCSE Regional Representatives

/s/ Linda S. McMahon
LINDA MCMAHON
Associate Commissioner
for Family Assistance

/s/ Louis B. Hays
LOUIS B. HAYS
Acting Director
Office of Child Support Enforcement

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 346442 324